

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LINDEN CARE, LLC,

Plaintiff,

vs.

1:15-CV-1335

EXPRESS SCRIPTS, INC.,

Defendant.

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Evidentiary Hearing - November 23, 2015

James Hanley Federal Building, Syracuse, New York

HONORABLE BRENDA K. SANNES

United States District Judge, Presiding

*Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315) 234-8546*

A P P E A R A N C E S

For Plaintiff:

BARCLAY DAMON LLP
Attorneys at Law
80 State Street
Albany, New York 12207
BY: LINDA J. CLARK, ESQ.
DAVID COST, ESQ.
JOSEPH MURPHY, ESQ.

BOIES, SCHILLER & FLEXNER, LLP
Attorneys at Law
5301 Wisconsin Ave, NW
Washington, DC 20015
BY: LAWRENCE V. ASHE, ESQ.
NICHOLAS A. WIDNELL, ESQ.

For Defendant:

HUSCH BLACKWELL
Attorneys at Law
190 Carondelet Plaza
St. Louis, MO 63033
BY: SARAH C. HELLMANN, ESQ.
CHRISTOPHER A. SMITH, ESQ.
URMILA PARANJPE BAUMANN, ESQ.

COZEN, O'CONNOR LAW FIRM
Attorneys at Law
277 Park Avenue
New York, NY 10172
BY: JOHN SULLIVAN, ESQ.

Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315) 234-8546

1 (Court convenes at 9:00.)

2 THE COURT: Good morning, Counsel. And I know that
3 Mr. Weiner was planning to be here about 10. Is that still
4 the case?

5 MS. CLARK: He is here earlier. He ended up coming
6 in last night, the flights just seemed too tight and
7 unreliable.

8 THE COURT: Do you want to proceed with Mr. Weiner
9 right now?

10 MS. CLARK: Sure.

11 MS. HELLMANN: I know that we're under a very tight
12 time frame. I know you have a hard stop at noon. Ms. Clark
13 was ready to close her case until we indicated that we were
14 going to call Mr. Weiner and then she wanted to continue him
15 on her case. If she is going to continue her case, I would
16 just like to know -- her estimates, in all due respect, have
17 not been accurate in how long witnesses are going to take. I
18 would like to have some sense and kind of hold her to it of
19 when this is going to stop. We had seven hours of testimony
20 on Friday. I have yet to give you an opening statement. I
21 have yet to do almost anything because of the time that
22 Ms. Clark has taken. So I just am very concerned that we're
23 going to be in the same position where we were on Friday that
24 I am just not given an opportunity to present our case.

25 THE COURT: How much time do you anticipate,

1 Ms. Clark?

2 MS. CLARK: Your Honor, the only stumbling block on
3 Friday was the cross-examination took a lot longer, and that
4 can happen. But Mr. Weiner has been on my list from the
5 beginning. And I think when I left on Friday I had not put
6 on Mr. Kantor. So what I'm trying to do is compress
7 Mr. Kantor and Mr. Weiner and put on one witness. So I've
8 actually made some significant efforts to streamline the
9 case. I don't know how long it's going to take. My guess is
10 we're talking about 40 minutes, 45 minutes.

11 THE COURT: Okay. Why don't we get going and you
12 may call your witness, Ms. Clark.

13 MS. CLARK: Thank you. Your Honor, the plaintiff
14 calls Mark Weiner. Your Honor, may I approach for a moment?

15 THE COURT: Yes.

16 (Sidebar discussion held on the record.)

17 MS. CLARK: [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 THE COURT: Okay. Thank you for letting us know.

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1 (Sidebar discussion concluded.)

2 MARK WEINER, called as a witness and being
3 duly sworn, testifies as follows:

4 DIRECT EXAMINATION BY MS. CLARK:

5 THE COURT: [REDACTED]
6 [REDACTED]

7 THE WITNESS: Thank you, Judge.

8 Q Good morning, Mr. Weiner. Can you please state for the
9 record your name and current position?

10 A My name is Mark Weiner. I'm the CEO of Linden Care.

11 Q How long have you been the CEO of Linden Care?

12 A About two and a half, three years.

13 Q Can you give the Court very briefly an overview of your
14 credentials and educational background?

15 A I graduated from the St. John's School of Pharmacy and
16 Health Sciences in 1989. After graduating pharmacy school, I
17 worked a little in the family business. I'm a third
18 generation pharmacist. And after working there, I started a
19 company that I sold to a -- a specialty pharmacy that I
20 started, sold it in 2002 to a publicly traded company. And
21 after that I stayed on with the company, worked in various
22 roles within that company. Moved on to a multi-disciplinary
23 practice as a consultant and helping them in their oncology
24 program.

25 Q For how long a period of time you were a practicing

1 pharmacist?

2 A Practicing pharmacist I would say from '89 to '95, '96.

3 Q Are you a practicing pharmacist now?

4 A No, I am not.

5 THE WITNESS: Can I move to the right because of
6 this light?

7 THE COURT: Absolutely.

8 Q Where do you work at Linden Care physically?

9 A I work in our Woodbury facility.

10 Q And how many employees are there in Woodbury?

11 A Approximately 130.

12 Q And are there pharmacists?

13 A Yes.

14 Q How many are there?

15 A There are eight pharmacists.

16 Q The eight pharmacists at Linden Care, are they all in
17 New York?

18 A They're located in New York, yes.

19 Q Are they all licensed in New York?

20 A Yes, they are.

21 Q Can you describe how it was that Linden Care became
22 involved in the pain medication specialty area?

23 A It was pain medications is a niche business of our
24 business, specialty business. We found there was a need for
25 pain control. Patients have a hard time finding these

1 medications, patients that are either in automobile
2 accidents, other accidents, a lot these patients have pain
3 due to secondary disease. There is a fact that the NIH or
4 NIS put out that there is 100 million Americans living with
5 chronic pain in our country now. So secondary to
6 neurological, orthopedic, rheumatoid diseases, and obviously
7 oncology as well.

8 So we found there was a need for it. And I would say
9 about five, six years ago or maybe longer the need got even
10 more because there was two just horrific events where
11 multiple people died at pharmacies in our area, so more
12 pharmacies didn't want to carry the medications because they
13 weren't set up properly safety-wise and have the compliance
14 needs to carry these medications.

15 Q Have there been developments in the Pharma world that
16 have also caused pain management to be part of specialty
17 pharmacy?

18 A Yes.

19 Q And can you describe those?

20 A There's a lot of new technology coming out about these
21 medications to short acting medications, short acting pain
22 relievers and medication that's given that would relieve
23 pain, what they call breakthrough pain. Breakthrough pain is
24 when patients who are on long acting medications and they're
25 either going for therapy or something that the long acting

1 just doesn't work, so there is a whole bunch of short acting
2 medications that will help the patient get through their
3 pain.

4 Q We're going to cover all this again, but you were here
5 in the courtroom when some of our colleagues talked about
6 TIRF REMS drugs. Do you remember that testimony?

7 A Yes.

8 Q Would that be one of the developments in your area?

9 A Yes, it would be.

10 Q Have those developments also caused greater regulatory
11 concerns that pharmacies had have to deal with?

12 A Yes.

13 Q What are those?

14 A There is regulatory that pharmacies have to deal with is
15 there is the proper storage of the medications. You have to
16 make sure that the medications aren't counterfeit, meaning
17 the technology that people have these days with printers and
18 going on to the website, people can easily print out
19 prescriptions, phony prescriptions. So part of what we do is
20 help keep these pharmaceutical medications off the street.

21 Q How has that affected pharmacies in particular?

22 A Pharmacies don't want to carry these medications. There
23 are safety issues all the time. I mean, if you go into some
24 chain stores or supermarket stores, they either don't want to
25 carry it because it's real easy for you get somebody who

1 might be an addict, who some of these addicts would do
2 anything to get their medication. And crazy as it is, some
3 of them would just walk in and put a gun to the young man or
4 the young lady sitting at the counter and say I want your
5 hydrocodone, I want your Vicodin, I want your this, I want
6 your that.

7 Q What investments has Linden Care had to make in order to
8 meet current modern standards with respect to the management
9 of those controlled substances?

10 A I would put our compliance department, and Arthur
11 Kersey, he is a former DEA agent who runs our compliance
12 department in which there is eight people in our compliance
13 department because we have to watch, part of our
14 responsibility of watching the patient's back, the doctor's
15 back and the public's back making sure patients what they
16 call aren't doctor shopping.

17 Some of these people would do outrageous things. They
18 might go to a pain doctor, a board certified doctor with an
19 MRI. You would be surprised, I'm sure you might not be. But
20 you can go online and buy an MRI, so people would go on, buy
21 an MRI and bring it to a doctor and say here's my MRI that
22 shows this, and the doctor says, okay, it's an MRI, I see
23 your dislocated disk, and write these medications.

24 Q With respect to the Woodbury pharmacy, is that a retail
25 location?

1 A Yes, it is.

2 Q And how many patients on a given week would come in and
3 out of the retail location in Woodbury?

4 A Hundreds.

5 Q And those patients come into the Linden Care pharmacy,
6 do they sometimes interact with members of the staff?

7 A Yes, they do.

8 Q What kind of services do they seek one on one in the
9 pharmacy?

10 A Besides the counseling about side effects of the
11 medication, they also seek our help in helping them cut
12 through the red tape and jumping through hoops to get through
13 the prior authorizations and get them the medications.

14 Q Now are all the drugs dispensed by Linden Care dispensed
15 from that location in Woodbury?

16 A I'm sorry?

17 Q Are all the drugs that are dispensed from Linden Care
18 New York, are they all dispensed from Woodbury?

19 A Oh, absolutely. I'm sorry.

20 Q Now you mentioned that there is some red tape involved
21 sometimes for patients. Does this have something to do with
22 the type of illnesses that the patients have or the types of
23 drugs that they take? What is it that creates the red tape?

24 A The red tape could be caused by a number of different
25 things. There could be the cost of the medication, there

1 could be the quantity of the medication, it could be an
2 increase in dose or frequency. So, for example, if Mr. X or
3 Ms. X has a medication where they get 120 or they're taking
4 four a day, 120 a day -- I'm sorry. If a patient is getting
5 four tablets a day and then the next month the dose increases
6 to either higher strength or they're taking more, taking 180,
7 might need a prior auth for that. You might need a prior
8 authorization because the cost of the medication exceeds a
9 certain limit or the quantity. And certain medications just
10 itself requires a prior authorization.

11 Q How does Linden Care interact with the patient and the
12 prescriber when those situations arise?

13 A The patient, Linden Care will interact with the patient
14 by gathering the information that we need working as part of
15 the health care team with the physician, the patient and the
16 payers who gather all the information, get it to the doctor
17 and work with the doctor to get that prior authorization
18 taken care of.

19 Q And we're talking about prior authorization, are we
20 talking about authorization of a drug that's on the patient's
21 formulary?

22 A Yes.

23 Q We discussed formularies. I'm not going to go over all
24 that again. But in each case when there is a prior
25 authorization sought, it's because the drug is offered by the

1 plan, the individual's health plan, and it's on their
2 formulary, correct?

3 A Yes. It's on their formulary and when we process the
4 claim, we process or adjudicate the claim, we are doing it
5 through the computer live so we get a response back from our
6 computer right then and there, is the medication paid for,
7 does it need prior auth, so we know realtime if the
8 medication and what's needed.

9 Q So is Linden Care frequently in a position of having to
10 advocate for the patient to get the drugs that their doctor
11 prescribed that are on their formulary?

12 A Yes.

13 Q And is that a daily occurrence?

14 A Yes.

15 Q Now how does the pharmacy benefit manager fit into that
16 equation?

17 A Well, the pharmacy benefit manager, or PBM, is the
18 person that ultimately makes the decision to authorize and
19 pay for the claim.

20 Q So does Linden Care have to interact with the PBM?

21 A Yes, we do.

22 Q What are the types of drugs that require Linden Care to
23 interact with the PBM on a prior authorization or
24 administrative basis?

25 A All types of medications.

1 Q Particularly are we talking about expensive drugs or
2 inexpensive drugs? What in pain management causes Linden
3 Care to be frequently in contact with the PBM on behalf of a
4 patient?

5 A It's the cost of these medications and the quantity of
6 these medications. And in some cases it's just the type of
7 medications they are being narcotic or controlled
8 medications.

9 Q When you say expensive, what are we talking? Talking
10 hundreds of dollars or more than that?

11 A We're talking about hundreds of dollars per dose.

12 Q Per dose?

13 A Yes. Which ultimately comes down to tens of thousands
14 of dollars per month.

15 Q We heard from Dr. Weingarten and you were here for his
16 testimony?

17 A Yes.

18 Q Some of the new classes of drugs that are coming out
19 take different forms, is that right?

20 A Yes.

21 Q Some of them are injectable, some of them are pills, is
22 that right?

23 A Yes.

24 Q And they frequently require special handling, is that
25 true?

1 A Yes.

2 Q And one of those drugs that you mentioned is the -- is a
3 topical medication. Can you describe to the Court, for the
4 Court the topical pain medications and how that plays into
5 this whole process?

6 A There is a topical medications that's it's a Diclofenac
7 Sodium 2 percent.

8 Q And why would -- is that an expensive medication?

9 A Yes, it is.

10 Q How does it apply?

11 A It's applied topically.

12 Q And is that an alternative to narcotic?

13 A Yes. Yes, it is. And it's an alternative to narcotic.

14 Q Why would a physician prescribe that over oxycodone or
15 some other narcotic?

16 A For multiple reasons. One reason would be you're
17 applying this medication directly to the area. [REDACTED]

18 [REDACTED] -- you apply two pumps directly to that
19 area, so it's being absorbed right to that area and it's not
20 a systemic, meaning you're not swallowing the tablet that
21 would cause gastro or GI upset and fewer drug-drug
22 interactions. When you're taking multiple medications at the
23 same time by mouth or swallowing or ingestion, there's a good
24 chance of drug-drug interactions.

25 Q And is that one of the reasons that in your experience

1 in working with doctors that they like to prescribe these
2 newer alternatives to addictive opiates?

3 A Absolutely because Diclofenac is a legend drug. Let me
4 back up. In pharmacy there is three classes of drugs; there
5 is narcotics, controls and legends, legend being obviously
6 non-narcotic, non-controlled. So you have prescribing legend
7 medications, there's no risk of addiction.

8 Q And does Linden Care sometimes have to advocate with the
9 patient to get that alternative form of products?

10 A Yes. We have to advocate with the patient, yes.

11 THE COURT: Ms. Clark, can could we try to focus on
12 the issues before the Court, which are likely success on the
13 merits and irreparable harm?

14 MS. CLARK: Absolutely.

15 Q Let's turn to Linden Care relationship with his pharmacy
16 benefit managers. Express Scripts is one of Linden Care's
17 pharmacy benefit managers, correct?

18 A Yes, they are.

19 Q And about how much of the market is ESI, or Express
20 Scripts, versus other PBMs?

21 A I believe ESI, or Express Scripts International, covers
22 about 30 to 35 percent of the lives or belly buttons in our
23 country.

24 Q As a CEO how important is it to be in the Express
25 Scripts' network to be a successful pharmacy?

1 A It's critical. You can't conduct pharmacy without being
2 in the Express Scripts network.

3 Q And can you explain to the Court why that is as a
4 reality?

5 A It's just a reality because we know if we were --
6 Express Scripts physicians know that if they -- when they
7 mention, especially with pain meds when they say, doc, I
8 can't find medications and everything else, the doctors can't
9 decipher and say we prefer Linden Care. But you can't take
10 Express Scripts. But on top of that once, you know, we're
11 seeing in the news, other PBMs are seeing in the news, in the
12 media what Linden Care new was false information about Linden
13 Care, so other PBMs they read this information in the news.
14 And we've already received two other termination notices
15 because of false information that's been in the news.

16 Q When you say two other termination notices, are those
17 from other PBMs?

18 A Yes, they are.

19 Q And can you describe the timing of those termination
20 notices in relation to Express Scripts' notice last week?

21 A Within five working days of receiving the Express
22 Scripts' termination notice, which we received on
23 November 10th.

24 Q And does that concern you as a CEO?

25 A It concerns me as a CEO because it's the livelihood of

1 our company.

2 Q Now, Express Scripts in addition to being a PBM is also
3 a competing pharmacy, is that right?

4 A Yes, they are. Express Scripts runs several different
5 mail order and specialty pharmacies across the country.

6 Q And you were here on Friday when Ms. Roberts testified
7 that Accredo, which is Express Scripts' in-house pharmacy,
8 doesn't compete with Linden Care?

9 A Yes, I was.

10 Q And what is your understanding of the overlap between
11 Accredo and Linden Care as competitors in the market?

12 A Well, theres a few things. We know that Express Scripts
13 sends letters out to patients that we fill prescriptions for
14 saying -- they send different letters. They'll send one
15 letter verifying the medication, being a PBM management,
16 that's what they're supposed to do. They'll send a letter to
17 Mr. X saying here is copy of what was dispensed, please
18 verify, which is what they're supposed to do. But they'll
19 take it one step further sending additional letters, dear
20 patient X, we know you received this medication. If you like
21 we could provide that as well from one of our mail order
22 pharmacies.

23 Q So the PBMs actively solicits Linden Care's patients by
24 sending them letters trying to get them to move over to the
25 Express Scripts' pharmacy?

1 A Yes. It's not just Linden Care's patient, it's all
2 patients within the network, not just ones that go to Linden
3 Care.

4 Q And over the weekend did you inquire as Linden Care
5 about whether or not any patients had begun to receive
6 notifications from Express Scripts that Linden Care had been
7 terminated?

8 A Yes.

9 Q What information did you get?

10 A We determined that some patients received some letter
11 instructing them on what to do. That we were terminated from
12 the network and what to do to move on to get their
13 medications.

14 Q What portion of the patients that you've been in touch
15 with got the letter?

16 A I'm not sure exact of the number.

17 MS. CLARK: Your Honor, I'm going to mark an
18 exhibit, if I may.

19 THE COURT: Yes.

20 MS. HELLMANN: Could I see a copy of it, please?

21 MS. CLARK: Yes. I apologize for the copy. We
22 printed it last night. Do you know what number we're up to?

23 THE CLERK: The list is up to 26, so it would be
24 27.

25 MS. CLARK: That's fine. Your Honor, with this

1 document we'll be redacting it at some point because it does
2 have patient information.

3 THE COURT: Ms. Clark, for the record it's been
4 marked as P27?

5 MS. CLARK: That's right.

6 Q Mr. Weiner, P27, do you recognize that document?

7 A Yes, I do.

8 Q And where did you obtain this document or where did
9 Linden Care get that document?

10 A One of our patients had forwarded us on a copy of this
11 letter.

12 Q Is that a copy of the letter that patients have started
13 to receive?

14 A Yes.

15 Q Indicating that Linden Care has been terminated from the
16 Express Scripts network?

17 A Yes, it is.

18 Q And you'll see in the first part of the letter it says
19 that changing pharmacies is easy. Do you see that?

20 A Finding another pharmacy is easy, yes. I'm sorry, the
21 next line, changing pharmacies is easy too, yes.

22 Q And based upon your knowledge of the availability of
23 pain medications, is that a true statement?

24 A Well, the first line, the first bullet point is a little
25 troublesome to me because it says, quote, "Take your

1 prescription bottle to your new pharmacy, they're contact
2 your old pharmacy to transfer your prescription."

3 Q Why is that problematic?

4 A First of all, they didn't address narcotics, you need a
5 new prescription every time. So that doesn't address the
6 issue. And also if people in a pharmacy walking in with a
7 bottle, whether it's methadone, morphine sulfate, fentanyl
8 products, oxycodone products, methadone products, morphine
9 products, patients are hesitant, you would need a new
10 prescription. For the controlled medications, you can't
11 transfer a prescription for controlled medication.

12 Q So if a patient walks in with a bottle into a pharmacy,
13 are they going to be able to get their medications?

14 A Are they going to be able to get, no.

15 Q What would they have to do? They would have to get an
16 appointment with their doctor, right?

17 A Doctors are a little and they should be wary about just
18 patient calling in just writing new prescriptions, because
19 everybody's at risk in the handling of these medications.
20 The administrative assistant is not just going to take a
21 note, oh, Dr. Smith, patient X needs medication, just write a
22 new prescription. The doctor's going to want to understand
23 the situation and the doctor's also going to be wary where he
24 or she is sending those medications for to what pharmacy.

25 Q What about the patient population that Linden Care

1 serves and the suggestion that people can just take their
2 bottle and walk into their corner pharmacy and get their
3 prescription filled?

4 A Well, not to be cheeky, a lot of our patients it's hard
5 for them to be driving or walking. If you think about these
6 chronically ill patients on narcotics and controlled
7 medications, so should some of them even be driving. I don't
8 want to say it's DWI but, you know, if someone's on chronic
9 medications, can they drive with these medications. That's
10 the first point there. And just wary of where these
11 medications are going.

12 Q Does that letter set forth a responsible transition plan
13 that deals with the needs of Linden Care patients?

14 A I think in my opinion Express Scripts could have had a
15 set up, with the big company they are and the specialty
16 pharmacies they are, they could have set up a special unit to
17 handle the transfer of these narcotic medications, a phone
18 number to get somebody, et cetera, et cetera.

19 We had a patient this week that, although it wasn't pain
20 medication, he has an issue getting his medication and he has
21 got multiple sclerosis.

22 Q And did that happen over the weekend?

23 A That happened Friday.

24 Q Okay. And what did that patient convey to Linden Care
25 when they reached out to Express Scripts?

1 MS. HELLMANN: Your Honor, we've had a lot of
2 hearsay in this case, but we've got to move this case along.
3 I'm going to object.

4 THE COURT: Overruled.

5 A When a patient PY reached out to Express Scripts, again
6 he was told there's something wrong with the way Linden Care
7 is processing the claim. And at that point because based on
8 what we heard, we were very clear to Mr. PY that we should
9 tell him that we were terminated from the network. That we
10 got two calls back, I believe it was the next day. One call
11 was from UniCare who said that, and one script was from
12 Express Scripts, and both acknowledge that, the person that
13 called from Express Scripts acknowledged that they weren't
14 allowed to reach out to the patient.

15 Q So even when Express Scripts had information that there
16 were patients that were having trouble getting their
17 medications filled, they indicated that they would not call
18 the patient, is that right?

19 A Correct.

20 Q Now, how is Linden Care classified as a pharmacy in
21 New York?

22 A Well, Linden Care is licensed, all pharmacies are
23 licensed through the New York State Department of Health
24 through the state Board of Education. We're licensed as a
25 retail pharmacy. I don't know if that's the question you're

1 asking.

2 Q Right.

3 A Yes, I'm sorry. We're licensed as a retail pharmacy.

4 Q Is it unusual based upon your experience particularly in
5 the downstate New York area for retail pharmacies to have
6 various methods to deliver medications to patients' homes?

7 A It's common practice to deliver to their primary address
8 or their secondary address, yes.

9 Q Wherever they need to get it, is that right?

10 A Yes.

11 Q So just because you use overnight delivery or courier
12 delivery, that doesn't make you a mail order pharmacy?

13 A No, it does not. My definition of a mail order pharmacy
14 or the traditional industry definition of a mail order
15 pharmacy is a pharmacy that's going to provide a ninety day
16 supply of maintenance medications, and for those who are not
17 aware, I don't want to -- I apologize if I'm making it --
18 maintenance medications is for high blood pressure,
19 cholesterol, chronic diseases of people with high blood
20 pressure, cholesterol, diabetes, people who are on these
21 medications for life.

22 Q Now among the plans that Linden Care serves, the plans
23 would be behind the pharmacy benefit manager, are there
24 Medicaid plans that are served?

25 A Yes.

1 Q Would examples of those Medicaid plans be Health
2 Insurance Plan of Greater New York, or HIP?

3 A Yes.

4 Q And a Medicaid plan, TotalCare Inc.?

5 A Correct.

6 Q And Linden Care provides medication to various patients
7 within the New York State Managed Care Medicaid plans, is
8 that right?

9 A Yes, we do.

10 Q We're talking about hundreds of Medicaid members, is
11 that right?

12 A I would say thousands of managed New York State Medicaid
13 patients, yes.

14 Q You were here on Friday when there was some discussion
15 about the bases for termination that were offered by Express
16 Scripts in their letter, correct?

17 A Yes, I was.

18 Q And not to spend any time on Maryland, because we've
19 dealt with that, but I would like to spend a little bit of
20 time on California?

21 A Okay.

22 Q On Friday you were here when Ms. Roberts produced a
23 spreadsheet and indicated that that was the basis for Express
24 Scripts' termination because it showed that there had been
25 very large numbers of prescriptions shipped into California.

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1 Were you here for that?

2 A I was here for that, Ms. Clark, but I could be wrong but
3 I believe it was Mr. Smith who presented it.

4 Q Okay. It was presented to Ms. Roberts, right?

5 A It was presented to Ms. Roberts, yeah.

6 MS. CLARK: And I think this is marked in the
7 record, Your Honor.

8 THE COURT: I'm not sure if it's marked in the
9 record.

10 MS. HELLMANN: I think it was Defendant's
11 Exhibit 6.

12 MS. CLARK: Is it marked, Your Honor.

13 THE COURT: Yes, Defendant's Exhibit 6.

14 MS. CLARK: So with respect to Exhibit 6, is there
15 one that I can hand the client, Your Honor, or hand the
16 witness?

17 THE COURT: I do not have an extra copy.

18 MS. CLARK: Okay.

19 Q Did Linden Care have an opportunity to consider and
20 review the allegations that were made by Ms. Roberts that
21 Linden Care had dispensed the prescriptions that are shown in
22 this exhibit?

23 A Absolutely. It was extremely concerning and alarming to
24 me, so it was addressed Friday afternoon, Saturday and
25 Sunday.

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1 Q And over the weekend was Linden Care able to evaluate
2 the vast majority of these claims?

3 A Yes, we were.

4 Q I'm going to ask you to take a look at the exhibit as it
5 relates to the center column?

6 A The carrier name?

7 MS. CLARK: Your Honor, may I approach?

8 THE COURT: Yes.

9 Q And do you see in the middle there is an indication
10 where it says carrier name?

11 A Yes, I do.

12 Q And just to start with, many of those claims relate to
13 major league baseball, do you see that?

14 A Yes, I do.

15 Q And I believe there is 31 of those major league baseball
16 items, is that right?

17 A I didn't count them, but if you give me a second I could
18 just count them now for you.

19 Q I don't think we need to. If you're comfortable with
20 that estimate, we can verify that. Can you explain for the
21 Court what it was about the major league baseball designation
22 that helps you determine whether or not these drugs were
23 shipped into California to California residents?

24 A Sure. A lot of these major league baseball personnel,
25 players, coaches work for, those not aware, there is 162

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1 games if they don't make the playoffs, in the schedule. Half
2 the time they're on the road. Before the season starts, I
3 think mid February, they're in either Arizona or Florida for
4 spring training. But all the major league baseball, because
5 they travel so much and knowing that Linden Care carries the
6 medication, very strict about privacy, like every other
7 pharmacy, but being that these are recognizable names, it was
8 handled by a small unit within Linden Care, all these
9 medications were shipped to stadiums or outside of
10 California. None of these medications were shipped to
11 California.

12 Q Not one?

13 A Not one.

14 Q And how did you -- how were you able to determine that?

15 A We have proof of delivery from Federal Express. And
16 some of these when some of the teams with through either
17 playing at City Field or Yankee Stadium, it would be getting
18 somebody to drive to the Bronx or to Flushing, it was quite
19 easily because everyone thought it was pretty cool to hang
20 out in the visitor's locker room, bring the medication to the
21 place, the locker room.

22 Q So when the teams were actually playing in the New York
23 metro area, Linden Care would hand deliver?

24 A We would hand deliver it ourselves because, like I said,
25 people thought it was pretty cool to check out the locker

1 room.

2 Q And these delivery tickets, are those the same delivery
3 tickets that we heard about that are produced as part of the
4 ESI regular audit process?

5 A Yes.

6 Q And when ESI conducts its cycle of audits, it would get
7 those delivery tickets, is that right?

8 A They would -- upon an audit an auditor or outside
9 company sometimes would require a proof of delivery or proof
10 of signature that the patient received it. So we have part
11 of our Pitney Bowes delivery system we're able to show the
12 prescription claim, a signature, and exactly where the
13 medication has gone to.

14 So what we did was we went through the claims here, I
15 believe there is 84, 85 claims. If you look at the line
16 number on the second page, there is 33, but they start at
17 page 6, and 1 is 64 and that starts, so I think it's in the
18 mid 80s. But what's more interesting and very disturbing and
19 annoying to me, Judge, was 16 of the claims never even left
20 the pharmacy.

21 Q We haven't gotten to that yet.

22 A I apologize, it's just --

23 Q Mr. Weiner, I'm going to show you a document that's now
24 been marked -- you can put that down for now -- P28.

25 MS. CLARK: Your Honor, I have a copy for you as

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1 well.

2 THE COURT: Thank you.

3 Q Do you recognize that document?

4 A Yes. This is what I don't know if it's an industry term
5 or what, at Linden Care we call it a term it's called a desk
6 audit.

7 MS. CLARK: Before we move on, Your Honor, I don't
8 think I moved into he have the last exhibit. Is there any
9 objection to the admission of that exhibit?

10 THE COURT: Is that Defendant's Exhibit 6?

11 MS. CLARK: Right. It's an Express Scripts'
12 document.

13 MS. HELLMANN: I think it was admitted on Friday,
14 Your Honor.

15 THE COURT: Okay. I wasn't sure if it was, because
16 I thought there was something that needed to be redacted from
17 D6.

18 MS. HELLMANN: You're right, we wanted to redact
19 some of the confidential information.

20 MS. CLARK: I think we're talking about two
21 different exhibits. I'm referring to the exhibit that we
22 just marked, which is the patient letter, 27. I don't
23 believe we marked that into evidence.

24 THE COURT: Any objection?

25 MS. HELLMANN: No. It wasn't on their exhibit list

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1 but we have no objection to that.

2 MS. CLARK: Again, we will redact that at the
3 appropriate time before it goes into the docket, Your Honor.

4 THE COURT: P27 will be admitted in redacted form.

5 (Plaintiff's Exhibit 27 received in evidence.)

6 Q And is it P28?

7 A Yes.

8 Q P28, is that a document that Linden Care would receive
9 from Express Scripts in connection with these desk audits
10 that you mentioned?

11 A Yes, it is.

12 MS. CLARK: Your Honor, I'm going to move into
13 evidence P28 as well.

14 THE COURT: Any objection?

15 MS. HELLMANN: Again, it wasn't on their exhibit
16 list. We have no objection.

17 THE COURT: P28 is admitted.

18 (Plaintiff's Exhibit 28 received in evidence.)

19 Q Looking at that document, does that have a list of
20 things that Linden Care has to submit in connection with the
21 Express Scripts audits?

22 A Yes, it does.

23 Q Does it indicate that there is a delivery documentation
24 required on the bottom? Do you see the reference to
25 signature logs on the second page?

1 A Yeah. I'm just reading it.

2 Q Sure. All the way down to the bottom.

3 A On the bottom it says, "Note, please provide signature
4 log copies with the specified fill dates."

5 Q And does Linden Care provide the delivery slips with the
6 signatures as evidence of the signature log that's required?

7 A Yes, we do.

8 Q And when Linden Care reviewed this issue over the
9 weekend, did it discover there were dozens of these letters
10 from Express Scripts during the time frame that's discovered
11 by the spreadsheet that we looked at?

12 A Yes.

13 Q So for all those dozens of audits, there would have been
14 delivery information provided to Express Scripts through the
15 audit process that they could have looked at?

16 A Yes.

17 Q Okay. We're going to move next to the category of
18 prescriptions that you started talking about related to
19 reverse scripts.

20 MS. CLARK: And for the Court.

21 Q Mr. Weiner, can you identify the exhibit that's been
22 marked P29?

23 A Yes, I can.

24 Q And what is that?

25 A This shows one of the prescription numbers referenced to

1 the information. This shows one of the claims on their
2 spreadsheet or claim information as being reversed, meaning
3 it never left the pharmacy.

4 Q So with respect to those 16 items that were identified
5 as reversals, that means that they never were actually
6 delivered anywhere, right?

7 A Correct, they never left the pharmacy.

8 Q And is that a document that's part of Linden Care's
9 regular business records?

10 A Yes.

11 MS. CLARK: Your Honor, I move P29 into evidence.

12 THE COURT: Any objection?

13 MS. HELLMANN: No objection.

14 THE COURT: P29 is admitted.

15 (Plaintiff's Exhibit 29 received in evidence.)

16 Q Now, if Express Scripts in its system wanted to
17 determine whether or not any of the claims in its
18 spreadsheet, which I think is D6, had been reversed and it
19 had in fact never been delivered, could they have seen that
20 in their system?

21 A Absolutely. It's just disturbing to me that -- yes.

22 Q With a click of a few buttons on a computer, they could
23 have seen that, couldn't they?

24 A Yes. Yes, they could.

25 Q Now the balance of the items deal with the remaining

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1 claims. Out of the 85 items on the spreadsheet, we talked
2 about the 31 major league baseball claims and the 16 reversal
3 claims. Were there other claims that Linden Care was able to
4 research to determine whether the actually delivery took
5 place?

6 A Yes. And to be clear, Ms. Clark, when this was brought
7 up to Ms. Roberts, it was very concerning to the entire
8 Linden Care team figuring we were -- heads were spinning
9 figuring out what was going on here and it's just inaccurate
10 information. So when we went back, we checked our delivery
11 records and none -- there is a majority of the claims, there
12 is still a small handful that we're still investigating
13 because they're with the old pharmacy system, but we have
14 proof to show that these medications were shipped outside of
15 California.

16 MS. CLARK: I'm going to mark one more exhibit.
17 And for the Court.

18 THE COURT: Thank you, Counsel.

19 Q Mr. Weiner, do you recognize those documents that are
20 P30?

21 A Yes, I do.

22 Q Are those part of Linden Care's business records?

23 A Yes, they are.

24 MS. CLARK: Your Honor, I'm going to move P30 into
25 evidence at this time.

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1 THE COURT: Any objection?

2 MS. HELLMANN: No objection, Your Honor.

3 THE COURT: P30 will be admitted.

4 (Plaintiff's Exhibit 30 received in evidence.)

5 Q And with respect to the balance of the claims that could
6 be researched on Linden Care's current software system, was
7 Linden Care able to establish whether or not any of those
8 claims that are part of P30 were delivered into California as
9 stated by Ms. Roberts on Friday?

10 A No.

11 Q Not one?

12 MS. HELLMANN: Objection. I think she is
13 mischaracterizing Ms. Roberts' testimony, stating that
14 Ms. Roberts testified that all of these went into the State
15 of California, Your Honor.

16 THE WITNESS: She did.

17 MS. HELLMANN: I don't think that was the
18 testimony.

19 THE COURT: Okay, Counsel, the record will reflect
20 what the record reflects. I think we all have the
21 transcript. So if you could just ask the factual question.

22 MS. CLARK: I'm not sure which factual question
23 we're at now.

24 THE COURT: With respect to P30, the case that none
25 of these shipments were made to California.

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1 THE WITNESS: Correct, Judge. Will you look on the
2 bottom, that yellow, each piece of paper, if you look at the
3 yellow tag there, that number that starts with 205, that goes
4 to -- that references the third column. So if you look at
5 this very first one, 2050778, that goes right to the top, the
6 first one, 20577801. Yes, the patient does have an address,
7 patient with AM or MA has an address in Los Angeles,
8 California, but we have the documentation from the Federal
9 Express system shows that this prescription was delivered to
10 and again this patient's name here, but was delivered to
11 Bellevue, Washington.

12 THE COURT: Thank you, Mr. Weiner.

13 Q And you mentioned -- go ahead.

14 A I apologize. It's just we worked so hard to build it
15 and people put information in the media that they could --
16 that affects people's livelihoods, that's just outright wrong
17 and this is the second time. They were quick to put a press
18 release about it. But with Maryland you would think that
19 after the thing that they would put some press release that
20 they were wrong about the Maryland information, we're yet to
21 see that in the Times, The Journal, but they were quick to
22 put that information to the Times and The Journal.

23 Q And this information that's turned out to be inaccurate
24 regarding Linden Care, what are the publications that you've
25 read that information in as a CEO about your company?

1 A New York Times, Wall Street Journal, various other
2 online information, et cetera, et cetera.

3 Q What has been the impact of Express Scripts' publication
4 of this information about licensing violations in California
5 and Maryland?

6 A Patients are concerned, doctors are concerned, our
7 bankers are concerned that finance us, our suppliers are
8 concerned and manufacturers are concerned.

9 Q How about your pharmacists?

10 A Our pharmacists, because they're the ones whose names
11 are on these prescriptions, they are concerned as well.

12 Q They have concerns about their professional standing?

13 A Yes, they do.

14 Q If Express Scripts had at any time come to you as CEO
15 before last Tuesday and presented the spreadsheet and
16 presented the information about Maryland, what would you have
17 done?

18 A The same way as we done a desk audit or regular audit,
19 we would have shown exactly the work that we've done here,
20 took us Friday, Saturday to do all this work, and we would
21 have done the same thing and presented to them and try to
22 work through, work through these issues.

23 Q One of the other issues that was not in the termination
24 letter but was addressed in the Express Scripts' press
25 releases was that Linden Care is a captive pharmacy of

1 Horizon. Did you see those articles?

2 A Yes, I did.

3 Q And I think we've already covered that Horizon owns no
4 part of Linden Care, is that right?

5 A That is correct. And in addition to that, from the
6 articles other smaller news agencies like CNBC on
7 November 11th had on their ticker because of the information
8 that was put out there by Express Scripts, on their ticker on
9 their screen provides Pharma owns Linden Care pharmacy.

10 Q And Express Scripts expressly terminated that they were
11 terminating Linden Care because of their relationship as a
12 captive pharmacy with Horizon, right?

13 A Yes.

14 Q What impact did that have on Linden Care?

15 A Just a trickle down effect.

16 Q Are you aware of any prohibition or rule in any of the
17 Express Scripts' contracts that says that you can't contract
18 with a particular manufacturer or that there is a certain
19 percentage that you can't exceed or anything like that?

20 A No. As a matter of fact, some of the specialty
21 pharmacies have limited distribution programs where they
22 actually work directly with closed networks or medications
23 that only certain pharmacies can carry, and I believe Express
24 Scripts owns some of those pharmacies.

25 MS. CLARK: Your Honor, I'm going to move things

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1 along, but I'm referring to the articles that the witness is
2 referring to are at ECF number 11-2, ECF number 11-2 and ECF
3 1-3, for the record. One moment, Your Honor. Your Honor, in
4 the interest of conserving time, that's all I have right now.
5 Thank you.

6 THE COURT: Thank you, Ms. Clark. Mr. Weiner, how
7 many of these claims that are on Defendant's Exhibit 6 are
8 you still investigating?

9 THE WITNESS: I believe it's five or six, Judge.

10 THE COURT: And do you have an estimate of how long
11 it will take the company to determine?

12 THE WITNESS: I'm hoping by day's end that we'll
13 have that information.

14 THE COURT: And you had mentioned that two other is
15 it PBAs terminated Linden Care?

16 THE WITNESS: Yes, PBMs.

17 THE COURT: PBMs, I'm sorry. What made you believe
18 that it was based on you said false information in the news?

19 THE WITNESS: Because there would be no other
20 reason. It's not a coincidence. They see it in the news and
21 they're protecting their clients, they see these allegations
22 that we're shipping medications and rightfully so. If we
23 were shipping medications into Maryland, if we were shipping
24 multiple medications into California for nonemergency
25 reasons, it would be concerning, so which is not the case

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1 here.

2 THE COURT: And what percentage of your business is
3 the two PBMs who terminated, who since terminated you.

4 THE WITNESS: I don't have that information
5 offhand.

6 THE COURT: What percentage of your business is
7 New York Medicaid?

8 THE WITNESS: I don't know those exact numbers,
9 Judge.

10 THE COURT: You have thousands of New York Medicaid
11 patients?

12 THE WITNESS: We have thousands of New York
13 Medicaid or managed New York Medicaid patients, yes.

14 THE COURT: Thank you, Mr. Weiner.

15 THE COURT: Mr. Weiner, one other question, what
16 percentage of Linden Care's business is narcotic or
17 controlled medications?

18 THE WITNESS: Linden Care is probably if not the
19 number one, number one, number two largest dispenser of
20 narcotic and controlled medications in the country, so we are
21 filling a vast need for it.

22 THE COURT: And do you know what percentage of the
23 company's business it is?

24 THE WITNESS: Of pain control management?

25 THE COURT: Yes.

1 THE WITNESS: I'm going to say that it's greater
2 than 90 percent.

3 THE COURT: Thank you, Mr. Weiner.

4 CROSS-EXAMINATION BY MS. HELLMANN:

5 Q Mr. Weiner, I want to talk for a minute about these
6 other two PBMs that terminated you, and I understand you
7 believe it's because Express Scripts terminated you, correct?

8 A I believe it has to do with the information that they're
9 reading in the news from Express Scripts' press releases.

10 Q And I just notice from your exhibit list that those
11 letters are on your exhibit list. Is one of those PBM's
12 Humana?

13 A Yes.

14 Q And one is Prime Therapeutics, correct?

15 A Prime Therapeutics, yes.

16 Q Do they state reasons in those letters for their
17 termination of you?

18 A Yes.

19 Q Were those reasons a breach of your agreement with Prime
20 Therapeutics and Humana?

21 A I don't know the exact wording, but I think so.

22 Q Did they allege that Linden Care had breached the
23 agreement with Prime Therapeutics and/or Humana in their
24 termination letters to you?

25 A Yes.

1 Q Were the reasons for those breach because you were
2 shipping prescriptions into the State of California or did
3 they state another reason for the termination?

4 A No, it is not because we were shipping them to
5 California.

6 Q And was the breach because -- what was the breach for?
7 What did Humana allege that you breached?

8 A Humana alleged that we were shipping medications into a
9 handful states, that was again inaccurate information.

10 Q And with respect to Prime Therapeutics, what did Prime
11 Therapeutics allege you breached the agreement?

12 A I don't remember.

13 Q Would it help if you saw those letters? I think they're
14 marked on your exhibit list.

15 A Sure.

16 MS. HELLMANN: I'm sorry, Your Honor, I haven't
17 seen copies of this, that's why it's taking me just a minute.
18 May I approach, Your Honor?

19 THE COURT: Yes.

20 MS. HELLMANN: And I apologize, I just don't have
21 any more copies.

22 MR. COST: I can get one more copy.

23 THE COURT: That would be helpful.

24 Q Mr. Weiner, I'm handing you let's start with the letter
25 from Humana. Do you see that letter?

1 A Yes, it does.

2 Q And I'm looking, it looks like Humana is alleging that
3 Linden Care shipped into a number of states which at the time
4 of the shipment they weren't appropriately licensed. And is
5 California on here?

6 A No.

7 Q And then does Humana also set forth an additional reason
8 for terminating Linden Care regarding the delivery of
9 prescription services at the last paragraph of that letter,
10 the last paragraph on page 1, sir?

11 A Yes, I just finished reading.

12 Q And another reason that Humana states that it's
13 terminating Linden Care is that it was engaging in mail order
14 versus retail services?

15 A That's what it says in the letter, yes.

16 MR. COST: Your Honor.

17 THE COURT: Yes, you may approach. Thank you.

18 Q And that's another reason Express Scripts terminated
19 Linden Care, correct?

20 MS. CLARK: Objection, Your Honor. It's a
21 different contract, different language, the standard's
22 completely different in the two contracts.

23 THE COURT: Overruled.

24 Q You can answer that, sir?

25 A Ask it again.

1 Q The reason that Express Scripts terminated Linden Care
2 was because it was engaged in mail order pharmacy services
3 versus retail, correct?

4 A Yes. That's one of the causes, yes.

5 Q And then looking at the Prime letter, again here Prime
6 states that one of the reasons it's being terminated is
7 because of dispensing prescriptions into states, correct?

8 A Yes.

9 Q And then another reason that -- and again no mention of
10 California, correct?

11 A There is no mention of California or any other state.

12 Q And then Prime identifies another reason for terminating
13 Linden Care, correct?

14 A Correct.

15 Q Which includes dispensing services without verification
16 of appropriate supporting diagnosis, correct?

17 A Pursuant to -- yes, that's what they say in the letter,
18 yes.

19 Q Do either of these letters state that they're
20 terminating Linden Care because of a press release by Express
21 Scripts?

22 A No.

23 Q Do either of these letters even mention the State of
24 California or Maryland?

25 A No, they do not.

1 Q Wouldn't you agree with me, sir, that these two PBMs
2 were terminating Linden Care because Linden Care breached
3 their agreement with these two PBMs?

4 MS. CLARK: Objection, Your Honor. That's their
5 allegation. She's stating it as a fact that we breached.

6 THE COURT: Overruled.

7 A No.

8 Q You don't agree with that?

9 A I don't agree with that.

10 Q You mentioned that each week hundreds of people walk in
11 to Linden Care, correct?

12 A Yes.

13 Q And I just want to talk a little bit, we've heard about
14 Linden Care just what it looks like. It's a huge warehouse,
15 correct?

16 A It's an office building.

17 Q How many square feet?

18 A Probably approximately 15,000, 16,000 square feet.

19 Q And when someone has a prescription and walks in, they
20 go through one door, correct?

21 A Yes.

22 Q And at that point they have to show their license,
23 correct?

24 A Well, actually, they go through one door and then they
25 go through a second security guard, by the security guard,

1 yes.

2 Q So to get in, to get in they actually have to show their
3 license and a prescription, correct?

4 A Well, not to get in. To get in they just walk into the
5 pharmacy, walk into one door, and then a security guard lets
6 them into the patient waiting area.

7 Q And the security guard, you have a security guard there
8 with a gun all day long, correct?

9 A Yes, we do.

10 Q And they walk into the patient area. And that's a
11 pretty bare-bones patient area correct?

12 A It's a typical patient waiting area.

13 Q There is nothing else they can get there? They can't
14 get a bottle of water or diapers or Advil, correct?

15 A Correct, there is nothing in the waiting room, just a
16 television set and some chairs.

17 Q So you said hundreds of people come in each week to pick
18 up their prescriptions, correct?

19 A Correct.

20 Q How many each week are mailed out of state?

21 A From those people walking in?

22 Q Well, if the people are walking in, they're not getting
23 theirs mailed out of state, correct?

24 A Correct.

25 Q And you said Linden Care dispenses hundreds of

1 prescriptions each week from people that walk in the door?

2 A Correct.

3 Q How many prescriptions does Linden Care dispense each
4 week to members out of state?

5 A Hundreds as well.

6 Q Thousands?

7 A Could be thousands.

8 Q Certainly a significantly higher amount than the people
9 walking in that door, correct?

10 A It is a higher number.

11 Q Mr. Weiner, you would agree that Linden Care has shipped
12 some prescriptions into the State of California, correct?

13 A I do not know that for sure. There is a possibility
14 that for emergency reasons we have shipped medication into
15 the State of California.

16 Q Well, Mr. Weiner, you told this Court in a declaration
17 that Linden Care had done an initial review and determined
18 that it had shipped some prescriptions into the State of
19 California, correct? Would you like to see your declaration,
20 sir?

21 A Sure.

22 MS. HELLMANN: May I approach, Your Honor?

23 THE COURT: Yes.

24 MS. CLARK: Counsel, which one is it?

25 MS. HELLMANN: 11-5.

1 Q Mr. Weiner, I'm pointing you to the top of page 6,
2 paragraph 22. Do you see the statement, Linden Care's
3 Initial Review?

4 A Correct.

5 Q Indicates that shipments to California were diminimus.
6 Do you see that?

7 A Yes.

8 Q So you did a review, correct?

9 A If for emergency reasons we had to ship for patient
10 continuity and patient care for emergency reasons, we would
11 ship into California.

12 Q So after your review, and I'm assuming you looked at
13 these prescription or these delivery logs like you showed us
14 today, correct?

15 A From the spreadsheet?

16 Q No. Whatever you reviewed to make the statement that
17 you only shipped a few prescriptions into California.

18 THE COURT: Counsel, I think you're misstating the
19 evidence. It says any shipments to California.

20 MS. HELLMANN: Right.

21 Q So what did you review, what did you review to determine
22 that if you shipped to California, it was for vacation or
23 diminimus reasons?

24 A The only reasons why we would ship into California would
25 be for an emergency reason.

1 Q So did you actually review any documentation, that's
2 what I'm trying to understand?

3 A We know it's policy and procedure that we would only
4 ship medications into California for emergency reasons.

5 Q Mr. Weiner, we've talked a lot about press releases and
6 I would like to hand you a press release from Linden Care.
7 May I approach, Your Honor?

8 THE COURT: Yes.

9 Q And this is a press release from Linden Care, correct?

10 A Yes, it is.

11 Q And on the back of it I notice it says Belhealth
12 Investment Partners?

13 A Yes.

14 Q What's Belhealth Investment Partners?

15 A Belhealth Investment Partners is a PE firm, or private
16 equity firm. That is the majority stakeholder in Linden
17 Care.

18 Q And in this press release Linden Care's responding to
19 the allegations, and do you see where it states, "Linden
20 Care's New York facility has not mailed any prescriptions to
21 patients residing in California other than incidental
22 accommodations for patients on vacation"? Do you see that
23 statement?

24 A Yes.

25 Q And did Linden Care --

1 MS. CLARK: Objection, Your Honor. It says or
2 traveling.

3 Q Or traveling to California. Do you see that statement,
4 sir?

5 A Yes.

6 Q And before Linden Care issued this statement to the
7 press, did it review what, if how many, prescriptions it
8 mailed to California?

9 A We know our policy is only to ship for emergency reasons
10 to California. If we shipped to California there was a
11 patient reason or patient care issue at risk.

12 Q Mr. Weiner, you talked about this audit document, I
13 think it's P28. Do you still have that in front of you?

14 A I believe so, Ms. Hellmann. Just give me a second.
15 Yes. Yes, P28.

16 Q And you indicated this is one of the desk audits that
17 Express Scripts conducts, correct?

18 A That's what we call it, desk audit.

19 Q This is when they fax you a specific list of
20 prescription claims, correct?

21 A Usually my experience it's been a specific claim, desk
22 audit.

23 Q So a desk audit, it looks at one particular claim,
24 correct?

25 A Yes.

1 Q How many claims does Linden Care submit to Express
2 Scripts every day?

3 A It would be two, 300 claims a day.

4 Q And Express Scripts doesn't send one of these audit
5 requests of on every one of those claims, does it?

6 A No.

7 Q You would agree it would be impossible to audit every
8 claim submitted by Linden Care or any other pharmacy,
9 correct?

10 A Correct.

11 Q And so when Express Scripts sends these audits, that's
12 the only time it gets the actual delivery information, that
13 FedEx thing, correct?

14 A A desk audit and also a routine audit. Meaning we might
15 get an audit that might have several hundred claims on it and
16 they'll ask the same information that they do for their desk
17 audit for those several hundred claims, yes.

18 Q And that's a good point. The desk audits usually come
19 by fax, correct?

20 A They come in fax usually that day that the claim is
21 processed. I don't know if there is something in the Express
22 Scripts system is that triggers the desk audit, I don't know
23 if it's a quantity, I don't know if it's something with their
24 particular plan, group number, but yes.

25 Q And then the field audits that you're talking about,

1 that's when somebody comes on site, correct?

2 A Yeah. We look at a letter from Express Scripts or
3 somebody performing the audit that here's a list of claims,
4 we're going to be performing a field on site or field audit,
5 please have that information available.

6 Q And again, that's the same information they asked to see
7 that the doctor actually prescribed the claim, correct?

8 A They want to see -- just to make it faster, they want to
9 see a copy of the original prescription, they want to see a
10 copy of the delivery ticket and signature, yes.

11 Q And for those particular claims that Express Scripts
12 audit, it has, like you said, the original prescription and
13 the actual signature delivery sheet, correct?

14 A Correct.

15 Q Did you see if Express Scripts had previously audited
16 any of the claims on this exhibit list?

17 A With the time that we had, our first concern was to see
18 that these claims weren't shipped into California.

19 Q At least with respect to P28, this claim isn't on that
20 list, is it?

21 A P28. I wouldn't know. I don't know if P28 is
22 specifically, you know, on there so I don't know.

23 Q And you talked a little bit about --

24 A If you give me two minutes, I can match up the Rx number
25 to the list and let you know.

1 Q Why don't you go ahead and confirm just for the Court.

2 A It doesn't seem that Rx number 225240101 from the desk
3 audit doesn't appear, but I'm trying to see the numbers. It
4 doesn't seem to be on here.

5 Q Thank you, sir. I just real quickly want to touch on
6 the reversals. What was the prescription that was reversed
7 on this reversal document? Does it show it on there? Is it
8 the 2023166?

9 A I'm just trying to match it up to one of the numbers
10 here to see exactly which one it is. 2023166. Yes, 2023166
11 does appear to be on the spreadsheet and it's also on this
12 document as well.

13 Q Okay. And on this spreadsheet is it actually on there
14 twice, one is a negative number?

15 A Yes, it is.

16 Q Does that indicate to you that this record is reflecting
17 a reversal as well?

18 A For that claim for, for that Rx number, yes.

19 Q This isn't representing that these were not reversed,
20 P6, correct, it's actually showing that this was reversed?

21 A Yes.

22 Q Mr. Weiner, Linden Care dispenses millions of dollars a
23 year in prescriptions just for Express Scripts' business
24 correct?

25 A Absolutely.

1 Q And Express Scripts represents approximately 20 percent
2 of your business?

3 A Yes.

4 Q Linden Care's a billion dollar a year company?

5 A When a run rate to be a little bit shy of a billion
6 dollar a year company, yes.

7 Q And I think you testified to the Court that you're the
8 number one or number two largest supplier of narcotic pain
9 medications, correct?

10 A Yes.

11 Q And you supply non-narcotic pain medications as well,
12 correct?

13 A Yes.

14 Q And with respect to the controlled substances, and you
15 talked about how the member has to bring that prescription
16 in, correct?

17 A Either bring the prescription in or have it e-prescribed
18 or shipped to us. They will either ship it to us or have the
19 physician ship it to us, yes.

20 Q And those controlled medications, every time the member
21 wants to get it filled again, he or she needs a new
22 prescription, correct?

23 A Depending on whether it's a narcotic, controlled and
24 if -- as you know, take a step back, Ms. Hellmann, narcotics
25 you need a new prescription each time. Controlled

1 medications differs in each state if you can have refills on
2 them, but controlled medications you can have refills, yes.

3 Q But with respect to the narcotic medications, you talked
4 about the members would have to go back to their doctor?

5 A Would have to go back to their doctor or call, contact
6 their doctor to get a new prescription.

7 Q Right. And that's every time, regardless of whether
8 they're going to a different pharmacy or going to Linden
9 Care, every time a new narcotic prescription is filled, you
10 need a new prescription for it, correct?

11 A Yes, unless it's an emergency supplied medication.

12 Q Mr. Weiner, would you agree with me that Linden Care is
13 not the only pharmacy that is accredited in the REMS TIRF
14 business?

15 A In the TIRF REMS?

16 Q I'm sorry, the TIRF REMS program.

17 A Yes, I would agree with you.

18 Q In your declaration you say there were a few pharmacies,
19 but there is actually quite more than a few, correct?

20 A Yes.

21 Q Over 500?

22 A I don't know the exact number.

23 Q You've heard of Village Pharmacy, correct?

24 A Yes, sure, absolutely.

25 Q And in your declaration you claim, you stated that you

1 didn't believe them to be credentialed in the TIRF REMS
2 program. Do you remember making that statement?

3 A I don't remember making that statement.

4 Q Let's take a look. It's the same declaration that you
5 have in front of you, sir.

6 A Okay.

7 Q You can go to paragraph 43.

8 A Do you have a page?

9 Q Sure. It's page 11, paragraph 43. Do you see that,
10 sir? Do you see where it says, "With all due respect to
11 Village Pharmacy, Linden Care has no basis to believe that
12 Village Pharmacy is credentialed to serve the TIRF REMS
13 program or otherwise has the same level of employee training
14 and experience"? Do you see that statement?

15 A Yes, I do.

16 Q Now you understand that Village Pharmacy is an
17 accredited TIRF REMS pharmacy?

18 A Absolutely.

19 Q So is that statement wrong in your declaration?

20 A It's not wrong. I believe it's being misunderstood. I
21 didn't say that it's not a TIRF REMS pharmacy. I feel they
22 don't have the credentials to handle the volume of pain
23 control patients that we have, and we actually verify that by
24 speaking to the people at Village Pharmacy.

25 Q And I want to talk about that phone call.

1 A Sure.

2 Q Have you listened to it?

3 A No, I did not listen to it.

4 Q But you understand there was a phone call between Linden
5 Care and Village Pharmacy, correct?

6 A Correct.

7 Q And from Linden Care, Mr. Fogel, your compliance officer
8 made that call, correct?

9 A Correct.

10 Q And someone named Mark Bortnick. Who is that?

11 A Mark Bortnick is the Chief Operating Officer at Linden
12 Care.

13 Q And did they tell you about this phone call?

14 A Yes. They told me the gist of the phone call, yes.

15 Q And this phone call, are you aware of when this
16 occurred?

17 A I'm not -- I know it was obviously after the
18 termination. I don't know exactly when it occurred.

19 Q Did Mr. Bortnick and Mr. Fogel tell that you Village
20 Pharmacy said they could handle up to thirty patients a day?
21 Did they tell you that?

22 A I don't believe they told me that.

23 Q Did they tell you that Village Pharmacy indicated that
24 if they didn't have the medication in stock, they could get
25 it within five or six hours?

1 A I don't believe they told me that, no.

2 Q Did Mr. Bortnick or Mr. Fogel tell you that Village
3 Pharmacy indicated that if there was an issue getting that
4 much from a supplier, they could call the supplier and talk
5 to them? Did they tell you that?

6 MS. CLARK: Objection, Your Honor. This is getting
7 deep into hearsay. We have the call; it's in the record.

8 THE COURT: Overruled.

9 Q Did they tell you that?

10 A No. But I do know that wholesalers don't just increase
11 your allocation with narcotics or controls on the spot.
12 Meaning you have to build up your allocation. You can't just
13 go from servicing two patients for certain narcotics and,
14 whether it's a TIRF REMS drug or another narcotic, to
15 servicing thirty patients. But also was the understanding
16 that the owner and the pharmacy director had no -- did not
17 want to get into this business.

18 Q And I just want to make sure I'm clear. It's your
19 understanding from what Mr. Fogel told you and Mr. Bortnick
20 told you after that call that Village Pharmacy didn't want to
21 be involved in this, is that your understanding of the call?

22 A They did not want to be involved in the volume of
23 patients that we're talking about.

24 Q Thank you. Mr. Weiner, you heard testimony from
25 Ms. P [REDACTED]. She was one of the members that talked on the

1 phone. Do you remember that?

2 A Yes.

3 Q And she's in Long Island, correct?

4 A I believe she lives someplace on Long Island, yes.

5 Q And Ms. P [REDACTED] went through a number of medications that
6 she's on and indicated that the next closest pharmacy to her
7 was about an hour away. Do you remember hearing that
8 testimony?

9 A I believe that's what she said.

10 Q Do you know if anyone has told Ms. P [REDACTED] about Village
11 Pharmacy?

12 A I personally did not tell her about Village Pharmacy.

13 Q You previously testified in a sworn declaration that
14 Village Pharmacy wasn't a sufficient alternative for another
15 member because they didn't have Subsys. Do you remember
16 making that statement in one of your declarations?

17 A Correct.

18 Q I understand that you weren't on the call and haven't
19 listened to that call, but would it be important for you to
20 know that Village Pharmacy could get that in a matter of
21 hours?

22 A If that's what they said or if that's what Village is
23 attesting to Express Scripts, but --

24 Q Village Pharmacy isn't telling Express Scripts that.
25 Village Pharmacy is telling your executives that, correct?

1 A I don't know because I didn't listen to the call.

2 Q Would it have been important you to know that, that a
3 member could go a couple miles down the road and get Subsys?

4 A Yes. But with that being said, it still goes back to
5 Village Pharmacy people telling us that they have policies
6 that they will not ship and they will not fill prescriptions
7 for patients who don't live -- that live outside a certain
8 amount of radius of their pharmacy.

9 Q Your understanding on that call is that Village Pharmacy
10 said it wouldn't fill prescriptions for people outside of a
11 certain radius?

12 A Yes.

13 Q Do you know that Village Pharmacy talked about whether
14 it needed to get licensed in other states to help these
15 patients? Did you know that was discussed on the call?

16 A Yes.

17 Q Mr. Weiner, in your declaration, another one of your
18 declarations you talked about a member AH was a part of the
19 TIRF REMS program. Do you remember that?

20 A Yes.

21 Q Do you know if anyone's told member AH about Village
22 Pharmacy?

23 A I don't think so. I'm not aware of patient AH lives.
24 They might have told her because depending on where patient
25 AH lives, she might live out of state, and it's the patient

1 who I believe, I don't know where AH lives, I think I have it
2 in one of these.

3 Q Mr. Weiner, we've talked about Village Pharmacy. And
4 you would agree there is pharmacies in every state that do
5 this type of business, correct?

6 A Correct. There is going by the number I believe
7 Ms. Smith said -- Mr. Smith said last Friday that there is
8 500 or 500 in that area, 500 TIRF REMS pharmacies in our
9 country, which seems like a significant number but when you
10 look at 500 pharmacies, and the 70,000 pharmacy, retail
11 pharmacies there are, it's a very small percentage.

12 Q There is certain other pharmacies besides Linden Care,
13 correct?

14 A Sure, there is. There is multiple pharmacies around the
15 country.

16 Q There is certainly other pharmacies that are TIRF REMS
17 credentialed beside Linden Care, correct?

18 A Yes.

19 Q One that's 3 miles down the road from you, correct?

20 A Three miles down the road if that's the exact, yes.

21 Q Mr. Weiner, are you aware that Express Scripts -- let me
22 back up.

23 I want to make sure I understand your testimony on
24 direct, was that Express Scripts said it couldn't talk to
25 members? That's what somebody told you, correct?

1 A Yes.

2 Q Are you aware that Express Scripts has specifically
3 requested the names of members that were having difficulty
4 getting their prescriptions filled?

5 A Yes.

6 Q Has Linden Care provided a single name to Express
7 Scripts?

8 A What we have been doing, I don't feel that -- we've been
9 providing the information, the 800 number and the Express
10 Scripts website, similar the same information that you in the
11 letter to them, to the patients.

12 Q Speaking of this letter, I thought your testimony on
13 direct also was that members were told by Express Scripts to
14 go to the Express Scripts mail order. Was that your
15 testimony?

16 A Which testimony, Ms. Hellmann?

17 Q Your testimony on direct. I thought you testified that
18 you had been told by some of your patients that they were
19 told by Express Scripts to go to an Express Scripts pharmacy?

20 A Yes.

21 Q Nowhere on this letter does it say go to the Express
22 Scripts pharmacy, does it?

23 A On which letter?

24 Q I'm looking at P27.

25 A It doesn't say -- it just says to locate a pharmacy or

1 call a local and ask them if they're in the Express Scripts
2 network.

3 Q Now I understand that you haven't provided Express
4 Scripts with any names of people that are having difficulty.
5 And, in fact, Linden Care's telling its own patients that
6 they don't need to think about another pharmacy, isn't that
7 right?

8 A No, that's not correct.

9 Q Did you hear Mr. G [REDACTED] testify, Mr. G [REDACTED] on the phone?

10 A Yes, I did.

11 Q Did you hear him state that he told Linden Care, if I
12 need to find another pharmacy let me know, and Linden Care
13 said no, we'll take care of you. Do you remember that
14 testimony?

15 A Yes, I remember that testimony.

16 Q And is that what Linden Care's telling its patients?

17 A No, that's not what Linden Care is telling its patients.

18 Q Linden Care's telling its patients that they may need to
19 find an alternative pharmacy, correct?

20 A Yes.

21 Q It's been two weeks, almost two weeks since the
22 agreement terminated, correct?

23 A Yes. Tomorrow is two weeks.

24 Q And you understand that the agreement also has a without
25 cause provision to terminate, correct?

1 A I don't understand that term.

2 Q Do you understand that the agreement also allows either
3 side to terminate the agreement for no reason?

4 MS. CLARK: Objection, Your Honor. The document
5 speaks for itself on this issue.

6 THE COURT: Overruled.

7 A I don't know if it was that two way, but I presume that
8 most contracts could terminate, yes.

9 Q And given that this agreement could be terminated for
10 cause or without cause, do you think it's important that
11 Linden Care continue to help their patients transition to a
12 different pharmacy?

13 A It's important that Linden Care makes sure that we don't
14 abandon patients and make sure they have their medications.

15 Q And in the meantime I understand that you've been doing
16 some bridge fills, correct?

17 A Yes. We're doing bridge fills for the care of the
18 patient because we're not talking about legend medications
19 here, Ms. Hellmann, these are narcotic medications. Linden
20 Care is very useful in keeping these medications off the
21 street and we work with law enforcement. We've been helpful
22 in putting the bad doctors who are just giving patients the
23 medications and everything else. So, yes, Linden Care is
24 very important in the chain supply of narcotic medication to
25 the patients.

1 Q And Linden Care is continuing to give these patients
2 short term pain meds without getting paid for right now,
3 correct?

4 A Correct.

5 Q I want to make sure I understand your testimony, because
6 it's kind of contrary to what Mr. G [REDACTED] said. But it's also
7 telling these patients that they need to find an alternative
8 pharmacy?

9 A Yes. We're telling patients, we're bridging off
10 patients, we're telling the patients that we are -- it's a
11 legal matter and we're going to go into court and hopefully
12 that we could eventually sit down and talk to Express Scripts
13 to work this matter out. But as you had said, once the
14 lawyers were involved, you know, all communications, although
15 we did try, as noted, to communicate to Express Scripts, all
16 communications has to go through.

17 Q And did you hear Ms. Roberts' testimony that Express
18 Scripts does not want to do business with Linden Care any
19 more?

20 A Yes, I did.

21 Q And knowing that, do you think it's even more important
22 that you tell your patients they may need to find another
23 pharmacy?

24 A Well, I think the reason why Express Scripts doesn't
25 want to do business with Linden Care is because Linden Care

1 helps the patients get sometimes these expensive medications
2 into the hands of the patients by helping them cut through
3 the red tape, jump through the hoops. And this also has to
4 do with maybe a matter between Express Scripts and Horizon
5 and Linden Care's being caught up between that dispute.

6 Q And I understand your opinion of Express Scripts, I do,
7 we've heard them a lot in the past day and a half. But my
8 question to you is you understand that Express Scripts has
9 said it does not want to do business with Linden Care,
10 correct?

11 A Yes, I heard it.

12 Q You heard Ms. Roberts said Express Scripts doesn't trust
13 Linden Care, correct?

14 A Correct.

15 Q And given that what you know, are you going to start
16 making sure your patients know they may need to find an
17 alternative pharmacy?

18 A Yeah. We're going to do that, but we are going to fight
19 this because, again, this all has to do with Linden Care
20 working to help get the patients the medications that the
21 doctor prescribed that ultimately Express Scripts was the one
22 that ultimately paid for the medication.

23 MS. HELLMANN: I move to strike his answer
24 unresponsive.

25 THE COURT: Denied.

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1 MS. HELLMANN: No more further questions.

2 THE COURT: Mr. Weiner, you had mentioned that the
3 company may have shipped medicines to California for
4 emergency reasons. Is there something that led Linden Care
5 to ship medicines to a state it's not licensed in for
6 emergency reasons?

7 THE WITNESS: Yes, I believe in California we can
8 ship medicines for emergency reasons.

9 THE COURT: And what constitute as emergency, do
10 you know?

11 THE WITNESS: Emergency being vague, but in our
12 opinion, especially dealing with narcotics, or it's not like
13 where patients could miss a medication and be in withdrawal.
14 If anyone ever had, I'm sure we all had patients who have
15 been in pain, friends in pain or family members being in
16 pain. I'm not talking dental surgery, I'm not talking
17 sprained their knee. We're talking patients who have failed
18 back surgery, oncology patients, long chronic. Like I said,
19 there is 100 million Americans living with chronic pain, so
20 if patients were relocated because they might have moved to
21 California because had to be relocated because of either
22 Hurricane Sandy or other reasons that their job maybe moved
23 them to California. Or I know we had patients who were
24 taking care of terminally ill family members and they were on
25 the medication, so while they were taking care of the family,

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1 because they weren't established patients of doctors in
2 California and they needed their medication. So emergency to
3 me would be somebody that can't continue their care of
4 medication.

5 THE COURT: I see. Any redirect?

6 MS. CLARK: Yes, Your Honor.

7 *REDIRECT EXAMINATION BY MS. CLARK:*

8 Q Mr. Weiner, we talked a little bit about the Humana
9 termination. That was a termination with notice, correct?

10 A Yes.

11 Q And Linden Care has prepared a response indicating that
12 Humana's bases for termination are just incorrect?

13 A Yes.

14 Q And that hasn't had any impact on patients and disrupted
15 their care or anything like that because it was done with
16 notice, correct?

17 A It was done with notice, yes.

18 Q And Linden Care intends to avail itself of its rights
19 under New York law to dispute that termination if need be,
20 right, if it can't be resolved?

21 A Under Public Health, yes, and going to arbitration, and
22 I forgot the number, but yes.

23 Q You're saying arbitration, you mean the peer review?

24 A The peer review arbitration or the peer review hearings,
25 yes.

1 Q With respect to the spreadsheet that was marked as D6,
2 have you seen any evidence from Express Scripts that any of
3 those prescriptions was actually shipped to a location in
4 California?

5 A No.

6 Q Have you seen any evidence that any prescriptions on
7 that list or any other prescriptions were shipped to
8 California residents in California?

9 A No.

10 Q If Express Scripts gave you the information that they
11 believe is the basis for that claim, would Linden Care be
12 able to research it?

13 A Yes, we would.

14 Q Just like Linden Care was able to affirmatively research
15 and refute with documentary evidence all of the prescriptions
16 on the chart with the exception of five that are not in its
17 current software system, is that right?

18 A Yes, it is.

19 Q So you're not saying that those five involve deliveries
20 to a California address or to a California resident, that's
21 not what you're saying, right?

22 A No, I'm not. I'm saying those five claims are still in
23 our old pharmacy operating system. We upgraded or operating
24 system from what was the OPUS system to what we now use is
25 ScriptPro, which has more robotics and everything else, so

1 those claims are in the old pharmacy system that we're still
2 investigating.

3 Q So when you're talking about the possibility of a
4 diminimus sort of emergency kind of situation, you're saying
5 that that's a logical explanation if you ever presented with
6 any evidence that that actually occurred, that that would be
7 your belief? That that probably would be an explanation if
8 you were presented with that evidence, right?

9 A Yes.

10 Q In your affidavit you actually say that any shipments to
11 California were diminimus and were sent to residents of other
12 states, right? That's what your affidavit actually says,
13 correct?

14 A Yes.

15 Q You never said or intended to say that Linden Care
16 delivered shipments of drugs to California residents in
17 California, right?

18 A Correct.

19 Q And certainly that was not the intent of the press
20 release either, correct?

21 A No, that was not the intent.

22 Q And with respect to patient continuity, Linden Care's
23 had a real concern about patient abandonment, right?

24 A Yes.

25 Q Is that something that pharmacists as professionals are

1 concerned about?

2 A As all health care professionals with the patient
3 abandonment, because especially with the issue of say a
4 patient, whether he or she is on methadone, methadone is a
5 medication that could be used for patients using on pain or
6 methadone could be a drug or is a drug that's used to get
7 patients off other addictive medications. A patient could be
8 addicted to other medications and they're using methadone.
9 Although yes, it's still a drug and it's still a very
10 powerful medication, but they might be coming off whether
11 it's heroin, crack, but it is a drug to use to keep the
12 patient from -- but someone coming off methadone just like
13 that, because part of the problem is the doctors write the
14 prescriptions on an every thirty day cycle, so that's why
15 patients need the medications and sometimes they can't wait,
16 you know, three or four days or even a day to get the
17 medication.

18 Q And does patient abandonment concerns and continuity of
19 care, is that one of the reasons that Linden Care is
20 requesting an opportunity to deal with the termination with
21 notice?

22 A Yes.

23 Q And as the pharmacy benefit manager responsible for the
24 well being of these individuals in making sure that they get
25 the drugs that they're entitled to from their plan, don't

1 they also have the responsibility to take care of the
2 patients and make sure that they're not abandoned and their
3 care is not interrupted?

4 MS. HELLMANN: Your Honor, Ms. Clark is testifying.
5 If she could just ask a question instead of leading the
6 witness.

7 THE COURT: Overruled.

8 A Yes. I would think that as a member again of -- they're
9 not saying, they're not health care providers, but the
10 process of claims, it should be about patient care, it should
11 be the number one concern.

12 Q Because they're representing the plans?

13 A Yeah. They represent -- I'm sorry, but Express Scripts
14 represents the plans, whose the patients pay their premiums
15 to the plans, the plans then contracts out with Express
16 Scripts to provide the pharmacies benefit side of those
17 plans. So if patients are paying into those plans to get
18 their medications, they should be able to get the medications
19 from the pharmacies that they want to get the medications
20 from, that's going to provide them with top service, provide
21 the doctors with top service, watch the patient's back, watch
22 the doctor's back, and also watch the public's back.

23 Q And Express Scripts has referred to the fact that it has
24 attempted to obtain from Linden Care the names, the
25 identities of some of the patients that have complained about

1 Express Scripts' termination of Linden Care, correct?

2 A Yes.

3 Q However, Express Scripts has direct access to records
4 that show which patients were approaching the end of their
5 prescription cycles, correct?

6 A Absolutely.

7 Q So if I were Express Scripts, I could log in in a few
8 touches of a button and find out when I decided to terminate
9 Linden Care which patients were going to be impacted Monday,
10 Tuesday, Wednesday and Thursday of last week, right?

11 A Absolutely. And further on that, just like the similar,
12 the spreadsheet, I don't know what number it is, but the same
13 way as the claim evidence here, information that's also
14 processed or adjudicated online to Express Scripts shows the
15 quantity of the medication and the day's supply. So if
16 Express Scripts the same way they went into this and able to
17 gather this, they should be able to gather exactly what
18 patients Linden Care filled what medications on what date,
19 what day supply, and if they filled a 21 day supply on
20 November 1st, they would know that patient's going to be
21 running out of medication. And it also identifies the type
22 of medication it is?

23 THE COURT: For the record, the witness was
24 referring to D6.

25 THE WITNESS: I apologize. There was just no

1 number on it.

2 Q And did Linden Care through its attorneys affirmatively
3 reach out to Express Scripts in a letter and affirmatively
4 offer to download its information about every patient that
5 was approaching the situation where they would be losing
6 their prescriptions?

7 A Yes.

8 Q And I'm going to refer to a document that's been filed
9 at 32-1. And that letter said, "In the event you are
10 suggesting there is some problem with ESI's ability to access
11 data, we do have available individuals at Linden Care who
12 could communicates with ESI to download our own database of
13 the patients impacted here." That's what that letter said,
14 didn't it?

15 A Correct.

16 Q And did Express Scripts have any interest in contacting
17 Linden Care to get the universe of patients who were being
18 impacted on a daily basis without termination of Linden Care?

19 A No.

20 MS. CLARK: That's all I have. Thank you.

21 MS. HELLMANN: Just a couple questions, Your Honor.

22 THE COURT: Yes.

23 *RECROSS-EXAMINATION BY MS. HELLMANN:*

24 Q Mr. Weiner, I heard you tell this Court that you believe
25 California law has an emergency exception. Was that your

1 testimony?

2 A Yes.

3 Q Did you hear your compliance officer testify that there
4 are no exceptions under California law?

5 A I don't remember him saying that.

6 Q Have you found any documentation, any records going
7 through it that would indicate that Linden Care is doing
8 anything less than 70 plus percent of its business out of
9 state?

10 A No.

11 Q You would agree that at least 70 percent plus of its
12 business is mailed to people out of the state?

13 A There is a good portion of our business that's home
14 delivery business, yes.

15 Q And we keep saying home delivery. It's mailed, correct?

16 A It's home delivery. There is a different definition
17 between mail order pharmacy and home delivery pharmacy.

18 Q Where is that definition?

19 A It's just there has always been the definition in the
20 industry that mail order pharmacy is a pharmacy of people
21 getting a ninety day supply of maintenance medications.

22 Q Do you think that Linden Care does any mail order
23 business?

24 A Do I believe that --

25 Q Yeah, that Linden Care does any mail order business?

1 MS. CLARK: Objection, Your Honor, to the term mail
2 order. It's been used ten different ways in this proceeding
3 and I think counsel should indicate.

4 MS. HELLMANN: He just gave me what his definition
5 was.

6 THE COURT: Overruled.

7 A Linden Care doesn't dispense any 90 day supply of
8 medication.

9 Q Why did you represent to Express Scripts that you were
10 doing 39 percent mail order?

11 A When did I?

12 Q On the provider certification. Did you see the provider
13 certification that Linden Care submitted in this case?

14 A The one from I believe it was December 2013.

15 Q Yes.

16 A Yes, so at that given point those numbers were accurate.

17 Q So at that point Linden Care was doing 39 percent mail
18 order?

19 A No, at that point Linden Care was doing 39 percent home
20 delivery services.

21 Q Does it say home delivery services on that provider
22 certification?

23 A I don't think we had the option of that.

24 Q You indicated in the box next to where it said mail
25 order 39 percent, correct?

1 A I indicated that -- not me personally but the company
2 indicated that 39 percent of our medications are home
3 delivery, and that 39 percent represented everything that was
4 shipped from our pharmacy, not all of that 39 percent was
5 outside the pharmacy.

6 Q Right. In fact, you noted that only 39 percent and that
7 included in state and out of state, correct?

8 A 39 percent considered home delivery in state and out of
9 state.

10 Q And we know today that over 70 percent is out of state,
11 correct?

12 A Approximately, yes.

13 Q Now Ms. Clark was asking you about the information that
14 Express Scripts has and there is no dispute Express Scripts
15 sees every claim that Linden Care submits?

16 A That's how they pay us, so we would have to see the
17 claim, yes.

18 Q And I know I believe from Ms. Clark's testimony and your
19 testimony that that should let Express Scripts know what
20 members are having difficulty finding an alternative
21 pharmacy, right? Is that your testimony?

22 A No, that's not.

23 MS. CLARK: Objection, counsel. Referred to
24 Ms. Clark's testimony and I think it might be an error.

25 A Restate the question.

Mark Weiner - Recross - Ms. Hellmann

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1 Q Was it your testimony to Ms. Clark's question that
2 Express Scripts has the ability from the claims data, Exhibit
3 D6, that Express Scripts has information regarding what
4 members can't find an alternative pharmacy?

5 A Not from the claims data. I think you're getting two
6 things mixed up. What we were addressing to that, if Express
7 Scripts wanted to, they can identify the patients that would
8 need the medication. If patients did call up Express Scripts
9 and say I got a CSR, or customer service representative, on
10 the phone, maybe would there be a note section in Express
11 Scripts. I don't know if Express Scripts puts notes in every
12 file if they call, and so forth.

13 Q Mr. Weiner, not every one of Linden Care's patients has
14 had trouble finding an alternative pharmacy, right?

15 A I don't know.

16 MS. HELLMANN: Thank you.

17 THE COURT: Any further questions?

18 MS. CLARK: No, Your Honor.

19 THE COURT: Thank you, Mr. Weiner. You're excused.

20 Ms. Clark, do you have any more evidence that
21 you're seeking to present?

22 MS. CLARK: No, Your Honor, other than the video,
23 and I think the Court is going to look at that some point
24 offline, because it's become part of the testimony today and
25 I would just -- I don't know if you want to watch it.

1 THE COURT: Is it a video or a tape recorded phone
2 call?

3 MS. CLARK: I think it's actually a tape recorded
4 call of the Village Pharmacy contact.

5 MR. COST: Videotape of a phone call.

6 THE COURT: Was that admitted into evidence?

7 MS. CLARK: It was, Your Honor.

8 MR. COST: It was.

9 THE COURT: Let's just confirm.

10 MR. COST: P17.

11 THE COURT: Yes, that's admitted into evidence.
12 And, yes, the Court will listen to the phone call.

13 Ms. Hellmann, did you have any evidence to present
14 today?

15 MS. HELLMANN: No, Your Honor. I just want a
16 chance to make a statement to the Court.

17 THE COURT: Okay. And Ms. Hellmann, do you have
18 any evidence that Linden Care shipped medicines out of state
19 to California?

20 MS. HELLMANN: Let me tell you what we based it on
21 was, what information we have in our systems.

22 THE COURT: Let me ask you first. Do you have any
23 evidence to present today that Linden Care has shipped
24 medicines to California?

25 MS. HELLMANN: We don't have any specific delivery

1 information, no. We don't have that in our possession. We
2 don't get that unless we do an audit. That's not information
3 that comes to us.

4 What we have is what the members tells us, a
5 shipment address and a resident address, that's what we have
6 in our system, that's their eligibility data, and if both
7 those addresses show California, sometimes they don't,
8 sometimes they do show different states, that's the only
9 information we have.

10 THE COURT: Okay. So you have no evidence to
11 present to the Court?

12 MS. HELLMANN: No. Other than what we presented on
13 Friday, no. We have no further evidence to present.

14 THE COURT: At this point why don't we have
15 argument regarding the case. And let me just state I would
16 like to start with I guess some thoughts and questions for
17 counsel.

18 And my first question with respect to the merits of
19 the case relates to the addendums to the Provider Manual, and
20 it appears to me, and maybe I'll ask Ms. Hellmann, that there
21 is an addendum, a New York Medicaid addendum to the Provider
22 Manual that has a termination provision that would appear to
23 apply here. As I understand it, Linden Care does have
24 members of New York Medicaid.

25 And so, Ms. Hellmann, I would be interested in your

1 views of why the termination provision in the Medicaid
2 addendum does not apply.

3 MS. HELLMANN: Sure, Your Honor. So that
4 termination provision which requires -- is a notice provision
5 for the Medicaid. It only applies to those members. Now,
6 Linden Care again in their provider certification shows no
7 Medicaid business, that's what they represented to us.

8 THE COURT: Let me stop you there. What are you
9 referring to?

10 MS. HELLMANN: The provider certification, Your
11 Honor.

12 THE COURT: Okay.

13 MS. HELLMANN: Again, this is part of the reason we
14 asked for the information to be updated. Mr. Weiner
15 testified to thousands of members of Medicaid. I mean, that
16 wasn't represented to us, Your Honor. So I would agree a
17 termination for those specific Medicaid members to the extent
18 they're identified would apply. I'm not saying otherwise.

19 THE COURT: And the termination provision requires
20 that Express Scripts give thirty days notice and that there
21 be a hearing after that thirty day notice period -- or a
22 hearing within thirty days, and that no termination should be
23 effective earlier than sixty days from the receipt of the
24 notice of termination?

25 MS. HELLMANN: Yes. I don't have the addendum in

1 front of me, but again, yes, if they're identified Medicaid
2 members with respect to that termination provision, yes.

3 Now, yes, I would admit that that's exactly what
4 that New York Medicaid addendum says, I'm not disputing that.
5 But in terms of I think your question was why didn't you guys
6 do that and I'm telling you what the representations were.
7 And I understand what Mr. Weiner said today. But I hope that
8 answers your question. Yes, it is a thirty day notice with a
9 nonbinding hearing.

10 THE COURT: I guess my question is I'm looking at
11 the likelihood of success on the merits, and there is a
12 breach of contract claim that claims of Express Scripts
13 failed to comply with its Provider Manual, and the
14 termination is in the Provider Manual. So are you conceding
15 this Express Scripts breached its contract with Linden Care
16 in connection with terminating immediately with respect to
17 the New York Medicaid members?

18 MS. HELLMANN: If there are New York Medicaid
19 members, if they can be identified, I would agree there is a
20 thirty day notice provision under that agreement, yes.

21 THE COURT: And at this point would Express
22 Scripts, if Linden Care provides evidence of the Medicaid
23 members, agree to rescind its immediate termination with
24 respect to those individuals?

25 MS. HELLMANN: Your Honor, no. And I'll tell you

1 why. I mean Linden Care is not asking for a TRO to enforce a
2 hearing. They're asking for a TRO to get back into this
3 network. There is no irreparable harm if they're right that
4 we breached the contract on this issue.

5 THE COURT: Let me just say, aren't you conceding
6 that you breached the contract on this issue?

7 MS. HELLMANN: If they can identify that. And none
8 of the exceptions apply. Then that's money damages. It's
9 not injunctive relief.

10 THE COURT: What about as to the patients, Medicaid
11 patient, who may have trouble in the way that patients have
12 indicated they're having trouble with their ongoing pain
13 medication and controlled substance medication, controlled
14 medications?

15 MS. HELLMANN: Your Honor, the patients are
16 absolutely so important, and we've been saying that from day
17 one. I mean, there has been a lot of stuff that's thrown out
18 there about how Express Scripts doesn't care about its
19 members and that's simply not true. We reached out to them,
20 member notifications have gone out. But the irreparable harm
21 in this case is the irreparable harm to Linden Care. I'm not
22 saying the members don't matter, that comes in in the public
23 interest section, but there is no irreparable harm to Linden
24 Care if they can prove a breach of this. It is money
25 damages. It's the money they lost because of this notice

1 provision. It's not irreparable harm.

2 And I don't think, I mean, we haven't heard any
3 testimony about a Medicaid member not being able to get their
4 medication. And I think, Your Honor, the testimony has been
5 that we have tried, we have outreached to members, and there
6 has been some hearsay and some he said/she said stuff, but
7 what we do know is that Linden Care's not telling its members
8 that they need to go somewhere else. So if they win on that,
9 to answer your question, it's not irreparable harm to Linden
10 Care.

11 THE COURT: I think the Court can look at
12 irreparable harm in terms of looking at the harm to members
13 to the extent they are in severe pain, they have medications
14 that if they do not have, they may have withdrawal symptoms,
15 and I think that's a factor that the Court can consider with
16 respect to irreparable harm, the patients.

17 MS. HELLMANN: I think there is a law that says
18 it's not harm to the third parties. I do believe that there
19 is law that says that. But this evidence of, I mean, all
20 we've heard is a bunch of generalities. The two patients
21 that testified, that didn't support that there is irreparable
22 harm there. I mean, we have so much hearsay in this case,
23 but the two patients that testified said, one said I told
24 them if I needed to go somewhere to let me know and they're
25 not. And the other woman, I mean, there is a pharmacy down

1 the road that can help her.

2 THE COURT: Ms. Clark, with respect to the New York
3 addendum for managed care provider IPA contracts.

4 MS. CLARK: Yes, Your Honor.

5 THE COURT: It appears to me when I look at this or
6 at least I'm not clear whether that addendum applies in this
7 case. The termination provision appears to apply to the
8 termination of an MCO when there is an agreement between an
9 MCO and another entity such as an IPA, or an MCO and a
10 provider, it's not clear to me that termination provision
11 applies here.

12 MS. CLARK: Yes, Your Honor. I think what we need
13 to do is step back. And actually I prepared a very brief
14 PowerPoint with link to the statutes, but we don't have
15 PowerPoint in this courtroom, so I'm not sure how to handle
16 exactly that.

17 But the problem is, Your Honor, that New York has
18 created a definition of IPA that embraces downstream entities
19 downstream from the HMO that have responsibility for creating
20 a network that serves the members. So if you take a look at
21 that linkage, and specifically -- give me one second. At the
22 definition of IPA, it says that it means, "A corporation,
23 limited liability company or professional services limited
24 liability company which contracts directly with providers of
25 medical or medically related services in order that it may

1 then contact with one or more MCOs, et cetera, et cetera.
2 This is very clearly designed to encompass all downstream
3 contractors that have the responsibility for putting together
4 networks of health care providers. That would include
5 physician practices, and by its very definition it would
6 certainly include pharmacies.

7 So we don't understand how Express Scripts can
8 claim that it's not encompassed by the IPA definition,
9 remembering that the IPA definition is incorporated, you
10 know, directly into their own contracts, specifically the
11 2011 amendment.

12 THE COURT: But if you're looking at the
13 termination provision, which is the termination provision for
14 the managed care/IPA contracts, it appears to apply to
15 terminations between an MCO and an IPA, which isn't the
16 situation that we have here. We have a termination --
17 assuming Express Scripts is an IPA, we have a termination
18 from an IPA is terminating a provider.

19 MS. CLARK: And what section are you looking at,
20 Your Honor?

21 THE COURT: I'm looking at the New York addendum to
22 the participating Provider Agreement, the part that deals
23 with standard clauses for managed care provider/IPA
24 contracts, and the termination provision is Section 5.

25 MS. CLARK: Yes, I'm looking at 5, and it says, "If

1 the agreement is between the MCO and the health care
2 professional, the MCO shall provide such health care
3 professional written explanation." Is that what we're
4 talking about?

5 THE COURT: Yes, all of those 5.1 you're reading, I
6 think 5.2 and 5.3. This agreement isn't between an MCO and a
7 health care professional. This agreement is if you're
8 correct by Express Scripts being an IPA, it's between an IPA
9 and a health care professional, assuming Linden Care is a
10 health care professional.

11 MS. CLARK: Your Honor, I think an IPA is an MCO
12 under the standard clauses and under the guidelines issued by
13 the New York State Department of Health. And the whole
14 structure of these agreements is that the obligations of the
15 MCO to provide these provider termination rights flows
16 downward in the contracts, and that's why Department of
17 Health required Express Scripts to have the overall reference
18 specifically to the mandatory clauses and the guidance
19 document.

20 I don't think it really matters so much the way
21 it's characterize in the addendum when the addendum
22 specifically incorporates by reference the standard clauses
23 and the definitions that we're relying upon in the agreement.
24 So I would say that you have to look at what an MCO is under
25 the New York definitions, which would include an IPA, and go

1 through the linkage by going through the managed care
2 clauses.

3 Now I wanted to point out that in exhibit in
4 appendix B on page -- this reference to the mandatory
5 New York provisions related to 4406-d shows up in the addenda
6 that you're talking about but also is specifically referenced
7 in appendix B at page 242.

8 THE COURT: Are you talking about the amendment to
9 the agreement, the 2011 amendment?

10 MS. CLARK: It's actually in the large manual that
11 we've been talking about. And I don't know that Your Honor
12 has a complete copy of the manual. I think it's in --

13 MR. COST: I can provide the Court a copy.

14 MS. CLARK: I know it was an exhibit because I
15 think I handed it to one of the witnesses and said is this
16 the Provider Manual.

17 THE COURT: The New York addendum to the
18 participating provider agreement is in the Provider Manual.

19 MS. CLARK: That is. But let me read from page 242
20 of the manual itself.

21 MR. COST: Your Honor, may I approach?

22 THE COURT: I think I probably have that.

23 MS. CLARK: On page 243 it specifically says, "As
24 required by the New York State Department of Health, solely
25 with respect to services rendered in the State of New York

1 under this agreement to any member of any prescription drug
2 plan offered by a sponsor that is certified as a managed care
3 organization under Article 44 of the New York Public Health
4 Law, the New York State Department of Health standard clauses
5 for managed care/IPA contracts shall be and are expressly
6 incorporated and adopted herein by reference.

7 So, you know, we have it in the addenda, the
8 New York addenda, which is an amendment to the Provider
9 Agreement actually, not just an amendment to the Provider
10 Manual. We have the Provider Manual in Appendix B at
11 page 242 and 243, again incorporating by reference in a
12 superseding way the New York managed care clauses and this
13 very important right both for patients and for professionals.

14 And then we have the 2011 amendment. And if we
15 turn to the 2011 amendment, that is even more explicit. It
16 attaches a copy of those clauses, which include 4406-d
17 hearing rights. And I'm going to grab a copy of that real
18 quick here. So if we look at exhibit -- this is the exhibit
19 that is the 2011 amendment that Your Honor was just referring
20 to?

21 THE COURT: Yes.

22 MS. CLARK: If we look at that document, this
23 amendment is a superseding amendment to the original
24 contract, and it not only specifically refers to the rights
25 that we're talking about that are set forth in the standard

1 clauses and we'll look at the standard clauses in a second,
2 but those standard clauses are actually attachment.

3 THE COURT: And I'm looking at that and that's what
4 I don't see how that applies to Express Scripts, because
5 again the termination provisions in that addendum, which is
6 Section 5, termination and transition, appears to apply to
7 agreements between an MCO, which Express Scripts is not.
8 Unless I'm missing something, Express Scripts is not an MCO.
9 Terminations between an MCO and an IPA or terminations
10 between an MCO and a health care professional.

11 And I understand that your argument that Express
12 Scripts is an agent of an MCO, but I don't see other than
13 that argument how Express Scripts is bound by this
14 termination provision.

15 MS. CLARK: Your Honor, I think to develop that
16 linkage, you need to look at the standard clauses that apply
17 to an IPA, the guidelines. We submitted those as one of our
18 exhibits. It's in the docket at 25-4.

19 THE COURT: Which clause are you referring to?

20 MS. CLARK: It will take me a second to get there.
21 Section five on page 9. So if you go to page 12 on that
22 exhibit 25-4, and I think this is featured in our brief but I
23 want to point it out. There's a specific note on page 9
24 below section 9B.

25 THE COURT: I'm not sure I have that document.

1 MR. COST: I can provide with you a document.

2 MS. HELLMANN: Do you have a copy for me as well?

3 MS. CLARK: It's 25-4. It was an attachment to our
4 brief, Your Honor, so that's why it's in the record. But we
5 have extra copies that we can provide.

6 THE COURT: So 25-4 and which page?

7 MS. CLARK: Page 12.

8 THE COURT: Yes.

9 MS. CLARK: It says, "PHL 4406-d," which is the
10 statute we're talking about," prohibits termination of a
11 health care professional contract by an MCO or IPA without
12 notice and the opportunity for a hearing, subject to certain
13 exceptions; nonrenewal is permitted on sixty days notice and
14 shall not be considered a termination under 4406-d."

15 And take a look at the end of that sentence, do you
16 see the open parentheses, SC E.2?

17 THE COURT: Yes.

18 MS. CLARK: That's the reference back to the
19 standard clause. So the Department of Health has
20 specifically issued this guidance to clarify that the
21 contract between the IPA and the provider is subject
22 specifically to the 4406-d protections.

23 THE COURT: Ms. Hellmann.

24 MS. HELLMANN: Yes.

25 THE COURT: Do you have any response?

1 MS. HELLMANN: I do. Express Scripts is not an
2 IPA. It does not meet the definition of an IPA. I mean,
3 there are specific limitations on what you need to do to be
4 an IPA. You need to have IPA in your name. You need to
5 register with certain -- you need to take certain steps with
6 the state. I mean, and it was one of the questions you
7 asked, Your Honor, about is there a law, is there law out
8 there that somehow takes these state regulations and prevents
9 a PBM from terminating its Provider Agreement, and there is
10 not.

11 THE COURT: Well, with respect to Medicaid there
12 is.

13 MS. HELLMANN: Right. But I'm talking about the
14 case law that these state notice laws, these laws somehow
15 prevent a termination, and there is absolutely no law that
16 has found that this section that has held an IPA applies to a
17 PBM, there is nothing out there. I mean, Ms. Clark keeps
18 referring that there is but we haven't seen any authority for
19 that.

20 I mean, the definition of an IPA, like I said,
21 there is certain things you need to make. We can talk about
22 diversified IPA, which is an Express Scripts subsidiary, but
23 they're not a party to this case. This agreement, the
24 Provider Agreement, for Express Scripts' entire network was
25 based on the Provider Agreement, the entire agreement. So I

1 guess Ms. Clark just keeps saying that Express Scripts has to
2 be an IPA and they're, therefore, bound by all these
3 provisions. There is no support for that. And IPA it's very
4 limited. I mean, this section, this New York IPA, MCO, it's
5 very limited to, and she pointed to the language on page 242.

6 With respect to services rendered in the State of
7 New York to any member of an MCO, that is what this section
8 applies to. No, Express Scripts, and you were exactly right,
9 is not an MCO. And there is just simply no authority for
10 this fact that this New York addendum then controls Express
11 Scripts' entire contractual relationship with Linden Care
12 that's based in every state.

13 Express Scripts is simply not an IPA under the
14 definitions set by New York and there is no limitation
15 extending it to it. And there is also nothing in the
16 definition about and if you act on behalf of one, or one is a
17 subsidiary; I mean, it is a very strict definition.

18 THE COURT: And let me ask you the definition
19 that's attached in the Exhibit 1, Appendix 1 to the 2011
20 amendment to the Linden Care Express Scripts agreement.

21 MS. HELLMANN: Right. Give me a minute. Are you
22 looking at the definition of IPA?

23 THE COURT: Yes.

24 MS. HELLMANN: Okay.

25 THE COURT: That defines an IPA as an entity formed

1 for the limited purpose of arranging by contract for the
2 delivery or provision of health services by individuals,
3 entities and facilities licensed or certified to practice
4 medicine and other health professionals.

5 MS. HELLMANN: Your Honor, Express Scripts wasn't
6 formed for the limited purpose of arranging for contract
7 delivery for MCO members, New York MCO members. And that's
8 one of the reasons why the state has those requirements in
9 terms of IPA has to be in your name and you need to take
10 these certain steps.

11 THE COURT: Where is the requirement that an IPA
12 has to be in the name?

13 MS. HELLMANN: It's in our brief, Your Honor. I
14 will find it and I will refer you to exactly the section.
15 It's actually, it's a state regulation and I know we cited it
16 in our brief and I can get it for you.

17 THE COURT: Okay. That would be helpful.
18 Ms. Clark, do you have any response?

19 MS. CLARK: Yes, Your Honor. If you look at
20 10MICRR98-1.2 in the definitions, it also has this definition
21 of IPA. And I don't understand counsel's argument. These
22 are undisputedly members of MCOs. All the members that are
23 members of the plans meet the definition of members of the
24 MCOs that are referenced in these guidelines and definitions
25 that we're talking about.

1 Whether or not Express Scripts has complied with
2 other regulations relating to what an IPA should do is really
3 irrelevant here. These are patient protected provisions.
4 They're designed to protect the patients and the provider in
5 this situation. So that's really the focus of the statute.
6 And I think the Court can see that in the Medicaid addendum
7 that there is, you know, you can put those two side by side
8 and you can see that the intention of this trickle down
9 patient protection scheme is clearly designed to run having
10 non-delegable duties to managed care organization that can't
11 be thwarted by a hiring a contractor to which you delegate
12 these managed care responsibilities.

13 I think that's the clear intent of the statutory
14 structure, it's buttoned up through the provisions that we
15 just looked at. But it's such a stretch in terms of
16 likelihood of success on the merits and the standard that we
17 have here to say that this body of law repeated, I don't even
18 know how many times in Express Scripts' own manual where they
19 repeatedly assent to the application of New York law and this
20 statute in particular, and then they claim, oh, we put it in
21 there but it doesn't apply to us. This is in their own
22 agreement. This is not in some ancillary agreement.

23 So the idea that they've agreed with the State of
24 New York to abide by these laws in their PBM contract, and
25 then say that it doesn't apply to PBMs. Your Honor, that's

1 nonsensical. The fact that they're including those in their
2 contract is an admission that those addenda apply to them.

3 THE COURT: And Ms. Clark, I see the guidance that
4 you've cited to. But it seems to me what should govern here
5 is what the parties -- the appendix, the addendum to the
6 Provider Agreement, and if I look at the language to the
7 addendum to the Provider Agreement, which presumably
8 incorporates New York law to this contract and this
9 situation, the termination provision is written as though it
10 applies to terminate when an MCO terminates an agreement.

11 MS. CLARK: Well, Your Honor, I think that -- give
12 me one second to catch up with you here. I think that you
13 have to look at not what is in just the manual. I think you
14 have to look at the specific clauses and mandatory New York
15 provisions that are specifically incorporated by reference in
16 the manual.

17 So, in addition to the addendum, you have several
18 provisions in the agreement where Express Scripts agrees that
19 it will be bound by New York law. So regardless of how it's
20 stated in the addendum, you still have to go back to the
21 New York mandatory provisions and the guidance document that
22 we provided, the New York State guidelines, that are
23 incorporated specifically by reference, and realize that
24 those end up trumping anything in the agreement, regardless
25 of how Express Scripts has stated the issue.

1 THE COURT: So you would agree that if Express
2 Scripts is not an IPA, then this, the 4406-d does not apply.

3 MS. CLARK: Well, Your Honor, we wouldn't agree
4 with that. Because even if they weren't an IPA under that
5 definition that we discussed, they would -- it would still
6 apply because the whole structure of these contracts calls
7 for Express Scripts to be the agent of the MCO in terms of
8 fulfilling this important responsibility to manage these
9 prescription benefits.

10 So, you know, that's very clear from the agreement.
11 It's supported by the case law that we cited, including the
12 *Pierce Apothecary* case, where courts have recognized that
13 this responsibility is really non-delegable. And as an agent
14 they can't do something that the managed care organization
15 couldn't do.

16 THE COURT: And it seems to me that they could be
17 an agent in certain factual scenarios, such as the case law
18 that you cited to the Court, they could be an agent where
19 they're working with the HMO, or the MCO, or where they're
20 doing something that the MCO asked them to do. But in this
21 case we have Express Scripts, and I haven't heard any
22 evidence that they're doing something at the behest of an MCO
23 or an HMO, there is no evidence of that before the Court.

24 MS. CLARK: Well, Your Honor, I would disagree with
25 that. We had evidence from Dr. Weingarten. We had evidence

1 from Mr. Fogel describing how in fact the formularies come
2 from the MCOs and are administered by Express Scripts as a
3 PBM on behalf of the MCOs.

4 So I think there is that linkage there in the
5 record, and I don't think that's been contradicted or
6 disputed by Express Scripts in any way, that they're acting
7 as the representative of the managed care organization in
8 implementing that plan's formulary, and that the patients
9 we're talking about are members of those MCO plans. I don't
10 think there is any dispute about that in the record.

11 MS. HELLMANN: Your Honor, if I may respond to that
12 just very briefly. Under Ms. Clark's reading, this limited
13 exception would swallow the rule. Express Scripts terminated
14 not only half of a New York MCO, and you're exactly right,
15 there are times actions that are taken on behalf of a client.
16 A client can have their own pharmacy network and may say,
17 Express Scripts, I don't want Linden Care in this network.
18 This was an action taken for its entire provider network. We
19 know and the evidence is undisputed that less than 30 percent
20 of Linden Care's business is New York. And besides just not
21 applying on its face, nothing about agents, that limited
22 exception would swallow the rule of the agreement, the entire
23 contractual agreement between these two parties.

24 And Your Honor, I want -- Ms. Clark referred to
25 that the *JE Pierce* case and kind of goes to the question of

1 is there a law out there on this specific issue with respect
2 to, you know, do these various state laws apply, do they
3 apply to a termination and do they apply to limit it. And
4 I'm still hoping that I can walk through a short presentation
5 with Your Honor because there is case after case that I will
6 cite to you that where various state laws have not stopped a
7 termination of an entire contractual relationship with
8 respect to a PBM and a pharmacy.

9 *Sorkins* is a case that I know I cited in some
10 briefs, and I have the cite for you, 2015 WL 249488. In
11 fact, the pharmacy was a New York pharmacy. They actually
12 raised violations of 4406-d. That was one of the claims they
13 raised. That preliminary injunction was denied.

14 I would like to go through a couple of other cases
15 where these state laws do not invalidate when you are
16 terminating what's at issue is an entire contractual
17 relationship over an entire network.

18 THE COURT: Let me ask you, but you do agree that
19 with respect to the individual members of New York Medicaid,
20 that the Provider Agreement does require that Express Scripts
21 provide thirty day notice? It does not -- Express Scripts
22 cannot immediately terminate those patients.

23 MS. HELLMANN: I agree with respect to those
24 New York Medicaid members. But I also will disagree that the
25 relief, if this is violated and none of the exceptions apply,

1 is not reinstatement into the network.

2 THE COURT: And what would be the harm to Express
3 Scripts of reinstating Linden Care into the network for the
4 purposes of the New York Medicaid patients who it breached
5 the addendum in failing to provide notice with respect to?

6 MS. HELLMANN: The harm to Express Scripts would be
7 that this relationship is over. And even if I mean now at
8 this point member notification letters have gone out, members
9 are not served by now, okay, you're back in for thirty days,
10 what served to get these members transitioned? And the
11 damage, if any, to Linden Care are money damages.

12 So that is the harm. The harm is that this is a
13 pharmacy that we don't want to do business with any more and
14 we're not contractually obligated to. And Your Honor, even
15 under that Medicaid, I mean, it's simply a matter of time. I
16 mean, that's what it is. And that's not irreparable. You
17 know, the *Trilogy* case that we cite in our briefs, that
18 you're basically prolonging the inevitable that this
19 relationship is going to end. So what we need to do is get
20 the members transitioned, many of whom I probably believe
21 it's been two weeks have been. And again, if Linden Care
22 thinks we breached it, go to arbitration, we can talk about
23 money damages.

24 THE COURT: Ms. Clark, I'll let you respond.

25 MS. CLARK: Yes, Your Honor. With respect to the

1 question of irreparable harm. You know the courts in
2 New York have found and in this circuit have found that this
3 kind of a severance of a relationship between a patient and
4 their health care provider is exactly the kind of harm that
5 should be avoided. And I'm citing specifically to the
6 *Medical Society of New York versus Toia* case, 560 F.2d 535,
7 which is a Second Department 1977 case.

8 But there is quite a legion of cases that deal with
9 the severance based upon breach of contract and those types
10 of concerns of a professional relationship between a patient
11 and a provider. And here that's not incidental, there is
12 plenty of evidence in the record, Your Honor, that these
13 patients rely heavily upon Linden Care for these pain
14 medications and for management of those medications and
15 everything else. So that's a very important factor here.

16 So we think that irreparable harm has been well
17 establish from the patient's perspective, from Linden Care's
18 perspective. You heard today the testimony about the
19 implications from Linden Care. And again, we know that
20 courts have recognized that the damage to the
21 pharmacist/patient relationship is also irreparable harm.

22 So I think there has been a gross underestimation
23 of the scope of this issue. It's the pharmacists, frankly,
24 Your Honor that have a right to this name clearing
25 proceeding. And so that's another aspect of this. This

1 isn't just a breach of contract case. This is the well-being
2 of the professionals involved and this professional
3 corporation that has its reputation on the line and has the
4 ability to advocate for patients.

5 And so I would also disagree, Your Honor, that this
6 is a matter of time. If we had the notice that's required
7 under New York law and the 4406-d hearing, both for all
8 members of New York managed care organizations that has
9 Express Scripts as a representative of them, ultimately if we
10 had that hearing, we would be able to show that this was an
11 improper termination because it violates 4406-c.

12 Now 4406-c is very important here. That's the
13 statute that says that no contract in New York shall prevent
14 a health care professional or provider from advocating for
15 their patients to get the medical treatment that they need.
16 And there cannot be not even a termination without cause,
17 there can't even be a nonrenewal in New York when it's done
18 for impermissible reasons. And we've seen in this case, Your
19 Honor, that the reasons that have been offered are clear
20 pretext. You know the Maryland thing, California. There has
21 been no evidence whatsoever that we violated a California law
22 by shipping a prescription into California to a
23 nonresident -- to a California resident in violation of law.
24 I think we spent a lot of time dealing with the intricacies
25 with the so-called mail order ban which doesn't exist in the

1 agreement.

2 So we have a very strong case that this is all a
3 pretext for punishing Linden Care for being a high volume
4 dispenser of expensive drugs that may not be good for the
5 PBM. And but we know all those utilization review functions
6 are directly in play here. So it's not a matter of time. We
7 will be able to show that and that would even prevent a
8 nonrenewal. It would certainly prevent a termination with or
9 without notice.

10 THE COURT: Let me say it appears to the Court that
11 what you're asking for is really a mandatory injunction
12 because Express Scripts did terminate effective immediately,
13 so what Linden Care is asking for is something that turns
14 back time to a pretermination state. The standard is more
15 difficult for a mandatory injunction. It requires a clear
16 showing that the moving party's entitled to the relief
17 requested or extreme or very serious damage will result from
18 the denial of preliminary relief.

19 I am interested -- I'm not sure we have evidence,
20 significant evidence before us on irreparable harm with
21 respect to the Medicaid members because I don't think the
22 Court -- I don't think there is a clear showing that the
23 termination provisions apply to members of MCO. So I'm not
24 sure that there is that clear showing with irreparable harm
25 with respect to Medicaid members.

1 I am troubled by Express Scripts' kind of varied
2 explanations for what it did here, and I would like evidence
3 of whether there are any shipments to California and whether
4 there are emergency exceptions under the law that would allow
5 Linden Care to ship to California. And whether there is
6 anything else that plaintiff wants to offer with respect to
7 irreparable harm with respect to the Medicaid, the members of
8 Medicaid, Linden Care's Medicaid members.

9 With that, I will allow counsel to argue with the
10 remaining time. I know, Ms. Hellmann, I haven't given you an
11 opportunity to argue, so I'll let you argue and then let
12 Ms. Clark finish. And let me just say I have read the cases
13 that you have cited to the Court so I don't think you need to
14 go over those, except to the extent they refer to what I've
15 mentioned are my concerns in this case.

16 MS. HELLMANN: Thank you, Your Honor. And I will
17 move quickly through those cases. There's a couple of cases
18 I don't think we've had a chance to cite yet, so thank you.

19 MS. CLARK: Your Honor, I'm hearing from our team
20 that we need a quick two minute break.

21 THE COURT: Yes, that's fine.

22 (Recess at 11:30.)

23 (Reconvene at 11:35.)

24 THE COURT: Now that we're back on the record, just
25 to let the parties know we canceled a conference we had at 12

1 so I have until 12:20 or 12:25.

2 MS. HELLMANN: Thank you, Your Honor. Again, I
3 will try to move through what we've already talked about.

4 Your Honor, as you know, Linden Care is asking that
5 this Court put together two parties to re-contract them, and
6 from what I just heard from Ms. Clark, that's a contract for
7 infinity, according to Ms. Clark, and that's not the
8 agreement at issue here. As you noted, and I'm going to talk
9 about the two things, irreparable harm and likelihood of
10 success, those are two of the four elements for a mandatory
11 injunction.

12 As to Court noted, when it's a mandatory injunction
13 it's even a higher burden. The central issue in this case
14 and what it stems around is did Express Scripts have the
15 right to terminate its relationship with Linden Care. That
16 is the central issue in this case.

17 Now we've talked a lot about the addendums and what
18 they apply, but this agreement, Ms. Clark talked a lot about
19 4.2(b). 4.2(c) allows for immediate termination in certain
20 circumstances on written notice. And it's under that
21 provision that this agreement was terminated, not 4.2(b).
22 Additionally, this agreement, an agreement between two large
23 sophisticated entities, allows either party, it's not
24 unilateral, either party to terminate the agreement for no
25 reason with written notice.

1 Express Scripts terminated Linden Care because it
2 misrepresented that it was a retail provider given the amount
3 of mail order business that it was doing. The definition,
4 I'm going to talk about it again, is primarily a retail
5 provider. And Express Scripts terminated Linden Care for
6 shipping prescriptions into the State of California.

7 THE COURT: Do you have any evidence of that?

8 MS. HELLMANN: Your Honor, so what we have, we
9 don't have the delivery logs. We have a lot of prescriptions
10 going into a state where the member lives and the member has
11 given us their shipping address. That good faith belief led
12 us to believe and determine that they were shipping these
13 prescriptions into the State of California.

14 Now Linden Care presented six witnesses in this
15 case. And what wasn't disputed was that Linden Care does not
16 meet the definition of a retail provider under the agreement.
17 That definition is they primarily dispense medications via a
18 retail store front. That's the definition. And even more
19 so, it specifically excludes mail order. So this concept
20 that mail order is this term we don't know, it's the opposite
21 of a retail pharmacy.

22 And we do know, and again not disputed, not one
23 person said, they ship over 70 percent of their prescriptions
24 out of the State of New York. And what we do know, and
25 Mr. Weiner offered some on this, when they gave us their

1 provider certification at the end of 2013, they understood
2 mail order, they answered it, it's 39 percent. And it's not
3 home delivery, it's mail order. That's what it says in the
4 provider certification.

5 And they indicated they do 39 percent and that
6 includes local and it includes out of state. And Linden Care
7 also admitted they had an obligation to be truthful in that
8 and they had an obligation to update it, because it's the
9 only way we know what type of business they're doing. And as
10 Ms. Roberts talked about, we have to have them appropriately
11 contracted. There are different networks and they were in
12 the retail network. It's the number one representation in
13 warranty that Linden Care made. This is a retail provider
14 contract, and they represented and warranted that they were
15 one. And to come in now and say we're not, we ship
16 70 percent out of state, it just doesn't hold any water that
17 claim that they're not a mail order pharmacy, especially when
18 they told us they were, they just told us that they just only
19 39 percent mail order.

20 THE COURT: Can you go back to the slide you had,
21 Linden Care is not appropriately licensed.

22 MS. HELLMANN: Right. In the State of California.
23 That goes to the California. And then did not provide the
24 accurate and updated provider certification. Again, updating
25 how much mail order they're doing.

1 I mean, and Your Honor, more evidence has come just
2 today. I hear there are thousands of Medicaid members. That
3 same provider certification didn't indicate any Medicaid
4 business. Express Scripts doesn't want to do business with
5 them in part because of these misrepresentations. We've
6 talked about the issue with the PIC, pharmacist in charge, it
7 wasn't in the termination letter. But there is law that not
8 every reason has to be stated in a termination for the bases
9 for terminating a pharmacy.

10 THE COURT: And if Express Scripts paid for
11 prescriptions, wouldn't Express Scripts have known that they
12 have members of Medicaid?

13 MS. HELLMANN: Your Honor, this goes back to the
14 trust factor. We cannot look at every claim that's submitted
15 to see what type of claims. We look at what they represent
16 in that provider certification. What do they represent their
17 business is? I mean it would be impossible to say, okay,
18 they submitted this claim, now are we up to 40 percent mail
19 order. It's why we have to trust the pharmacies.

20 They've talked a lot about the audits. The audits
21 are scripts here, scripts there. The credentialing process
22 is where we learn the type of business a pharmacy is and what
23 they're engaged in, and we have to rely on the fact that
24 we're going to get updates to that. It's only the way that
25 we can feasibly have 65,000 pharmacies in our network and

1 continue to do business.

2 As I mentioned, there is law that you're not bound
3 by the reasons you state in the termination letter, but we
4 stated reasons in the termination letter, and those reasons
5 are enough. But what it does go to show is these continuing
6 things that we've learned, discipline in Oregon, not updating
7 the PIC, not representing Medicaid. It's just more evidence
8 that we don't want to do business with them. And this claim
9 that other PBMs are terminating them because of Express
10 Scripts is silly. Those other PBMs terminated because they
11 found that they breached their agreement.

12 And Linden Care's response on the retail versus
13 mail. First Linden Care said, well, we use FedEx so that's
14 not really mail. It's silly. It's just a silly distinction
15 that somehow if you FedEx something, it's not mail order.

16 They also indicated that Linden Care's shipment
17 numbers change so they couldn't possibly update it. We're
18 not talking about going from 39 percent to 40 percent. We're
19 talking about going from 39 percent state and local to over
20 70 percent out of state. That is a huge change. You go from
21 being mail order in the minority to being a great, great
22 majority, because 70 percent now is again completely out of
23 state. It is not primarily a retail provider.

24 And then finally there was some testimony that
25 Linden Care is a retail pharmacy because people actually walk

1 in the door. Again, the definition of retail provider wasn't
2 that if you do any, you're a retail provider. It's if you
3 primarily, if you primarily dispense prescriptions from that
4 retail store front. And they're not doing that. And there
5 is nothing, nothing said they weren't.

6 We've touched on this a little bit about the
7 New York law somehow prevents what's happened here, and there
8 is not a single reported decision that agrees with Linden
9 Care's position. There is not. The *JE Pierce* case found
10 that PBM was not bound by AWP laws. It wasn't a pharmacy
11 termination case, it was a conspiracy case. And likewise,
12 the same thing with the Mississippi case that they cited, it
13 never held that PBM was subject to state laws.

14 There is a number of cases in here we cite, most of
15 which are in our brief. I just want to point out a couple of
16 things. The *Medcare Diabetic* case was a pharmacy termination
17 case arguing that state law notice requirements prevented the
18 termination. In this case this pharmacy was terminated
19 because they represented they were a retail provider and they
20 were doing mail order. So this isn't this like crazy idea
21 that we came up with. It is important, because as
22 Ms. Roberts testified to, you have to be appropriately
23 contracted because there is different standards for mail
24 order than there is for retail.

25 *North Shore Home Medical Supply versus Catamaran,*

1 this is a decision that just came out of the District of
2 Massachusetts a couple of months ago. Again, pharmacy argued
3 that the state law prohibited the termination. And in this
4 case the pharmacy at issue was a pharmacy that it sounds
5 similar in that they delivered pharmacy supplies to people
6 that were unable to leave their homes. And again, the Court
7 held that the statute did not prevent a carrier from
8 sanctioning on their network-wide basis noncompliant
9 pharmacies.

10 And I want to talk about irreparable harm. Linden
11 Care has had no evidence about irreparable harm to them.
12 They have talked about money damages. They have talked about
13 that Express Scripts is 20 percent of their business. But
14 they cannot establish irreparable harm with a contract that
15 is terminable at will. There is no legal authority for this.

16 Again, I mentioned the *North Shore Home* case.
17 There the court found that the loss of business, the loss of
18 good will, it's money damages and it's not irreparable. And
19 again, this was the pharmacy similar to a Linden Care that
20 specialized in delivering prescriptions to patients. There,
21 similar to Linden Care, this pharmacy about 15 percent of its
22 customer base is insured by health plans that was serviced by
23 *catamaran*. The Court found it was relatively minor, and more
24 importantly, quantifiable. And then the Court went on to
25 note about the members and the announcement of public

1 interest and the balance of equities, sympathetic to the
2 member disruption. But there are other pharmacies that are
3 available.

4 The *Sorkins* case I referenced early. This is the
5 case where the pharmacy alleged a violation of 4406-d. And
6 here there was an alleged loss of 40 percent of its customer
7 base. Again, the Court found that it is not irreparable and
8 money damages could be addressed following a trial, following
9 an arbitration, following getting to the merits of this case.

10 In *Trilogy* the testimony was even stronger, *Trilogy*
11 *versus Medco*, out of the District of New Jersey. There was
12 testimony that the business was going to be destroyed, that
13 they were going to have to lay off the remaining workers.
14 And again Judge Chesler said it's not irreparable harm. In
15 looking at this, and this is important, the Court noted that
16 the contract was terminable at will with sixty days notice.
17 And the Court found there is nothing unique about these
18 damages because in sixty days it's going to happen and it
19 doesn't make it irreparable. *Alternative Medicine and*
20 *Pharmacy* is the same, the parties agreed that the contract
21 could be terminated. It's not irreparable harm.

22 Mr. Fogel testified about the hundreds of thousands
23 of dollars they're spending each day. They alleged, and
24 Mr. Weiner confirmed, that Express Scripts represents
25 20 percent of Linden Care. These are money damages. As the

1 Court in *Trilogy* noted, the best case scenario, it kicks the
2 challenge, if there is a challenge, down the road, and it's
3 not unique and it's not peculiar. And if Express Scripts is
4 wrong on the claims, Linden Care can recover monetary
5 damages.

6 And I want to talk about member impact, because it
7 is important, and I'm not saying it's not relevant to this
8 Court's analysis. But Dr. Weingarten confirmed that there
9 are other pharmacies available. We know that there is
10 hundreds of TIRF REMS pharmacies. And one pharmacy is
11 Village Pharmacy located minutes from Linden Care.

12 And I know Ms. Clark referred to the video
13 recording, and if we had time I would ask that we all listen
14 to it together, because I listened to it and what as
15 represented in this court as to what Village Pharmacy said
16 and what Village Pharmacy could do and could not do is not
17 accurate. It was question after question by Linden Care
18 representatives I think trying to get Village Pharmacy to say
19 they couldn't do it. And it was concession, I can try to do
20 this if you give me the prescriptions, I can get the
21 medications today. And that's -- I mean, we keep talking
22 about Village Pharmacy because it's so close to Linden Care,
23 and we're not saying Village Pharmacy is the only one, but
24 it's just an example that there are other alternatives out
25 there.

1 And Express Scripts has reached out and we're still
2 willing to reach out and we're still willing to do that,
3 because contrary to kind of the smear that's gone against
4 Express Scripts, they're our members. We need to keep them
5 happy. We need to make sure they're getting their
6 medications and finding a pharmacy. If not, we're going to
7 lose our clients. We're going to lose the members. And we
8 have every incentive to make sure that happens.

9 So irreparable to Linden Care is zero. It is money
10 damages, if that. And the member impact, while important,
11 does not establish irreparable for Linden Care. And it's
12 being addressed and it has been addressed. And for Linden
13 Care to continue to say there is no other pharmacies by
14 telling Mr. G [REDACTED] he doesn't need to go to one and
15 representing that Village Pharmacy just can't do this work,
16 it's wrong and it's simply not fair.

17 Your Honor, before I sit down I want to address the
18 arbitration issue. And I feel like it's been a little bit of
19 a moving target of the enforceability of this arbitration
20 provision. There has been a number of reasons of is it
21 enforceable, where, what, and I continue hearing new
22 arguments from Linden Care. And first of all, the question
23 of enforceability, and we address this in our brief, it's a
24 question for the arbitrator. And Ms. Clark seems to concede
25 that in the last filing, it's the *Rent a Car*, United States

1 Supreme Court case.

2 So the first time Linden Care raised the issue that
3 there was no agreement to arbitrate, and it appears that
4 Linden Care has taken the position that this addendum or the
5 appendix superseded or amended the agreement to arbitrate in
6 the underlying Provider Agreement. And that's not accurate.
7 The arbitration provision in the New York addendum, if it
8 applies, it simply venues the arbitration in New York. It
9 doesn't say that it supersedes a mandatory arbitration
10 provision. There is one. It is binding, it is broad, it
11 encompasses this entire dispute. At most, at most the
12 New York addendum does is it venues an arbitration in
13 New York.

14 And I mean, to some extent some of this could be
15 shortcut if I know that their position is we're going to
16 arbitrate, it's just a matter whether we're going to
17 arbitrate in Missouri or New York. Originally when we first
18 had a couple hearings on the phone, that's what I thought the
19 issue was. Now I feel that there is an issue there is not
20 even an agreement to arbitrate, that's why I wanted to
21 address those arguments.

22 But again, we have a venue provision for
23 arbitration but we still have a binding arbitration. It's
24 never been amended, superseded, deleted, anything.

25 THE COURT: Ms. Hellmann, do you agree that the

1 venue provision applies here?

2 MS. HELLMANN: I don't, for the same reason that it
3 goes back to your question of when would this addendum apply.
4 And it's the fact scenario that I gave you. If Express
5 Scripts on behalf of one of its MCO members terminated Linden
6 Care and there was that dispute, it would be venued in
7 New York. And it makes sense because the decision makers,
8 the players are in New York. I mean, here if you're going to
9 venue an arbitration for a network-wide termination that,
10 frankly, effects a heck of a lot more people outside the
11 State of New York because they're shipping so much outside of
12 the State of New York, because this venue provision, again
13 it's limited to members of managed care plans.

14 That said, Your Honor, if Ms. Clark said we
15 absolutely need to arbitrate, you know what, we're
16 sophisticated parties, send it to the AAA. We can arbitrate
17 in Chicago, we can arbitrate in Phoenix. But I'm not sure
18 that there is disagreement to arbitrate. Again, the AAA the
19 place of hearing is relatively minor. The AAA, the
20 arbitrator sets the rules, and the AAA arbitration provision
21 in the Provider Agreement is a binding arbitration provision.
22 If we can get there, I think we could go wherever the parties
23 want to go. I mean, we have no problem with that. But in
24 these later filings, I'm hearing unconscionability arguments.
25 I'm hearing that the public law policy trumps the arbitration

1 provision, and that's inaccurate. I mean, the
2 unconscionability argument, the fact that they're claiming
3 this is a contract of adhesion. They're asking this Court to
4 reinstate that contract and then they're also saying that
5 it's a contract of adhesion. This is a very large company.
6 We saw the number of lawyers and executives that were here on
7 Friday. These are two large companies and there has been no
8 evidence this is a contract of adhesion. On the
9 unconscionability aspect, they make the argument that --

10 THE COURT: Let me just ask you. Do you agree that
11 New York law governs the arbitration with respect to members
12 of the New York managed care organization?

13 MS. HELLMANN: I don't, for the reason that I said.
14 Because again, when it's a network-wide termination, I don't
15 think that addendum applies. I guess we're saying we could
16 have two competing arbitrations going on.

17 THE COURT: Yes.

18 MS. HELLMANN: And I don't -- frankly, I don't
19 think that makes much sense. So again, if we have an
20 agreement to arbitrate, we could send it to the AAA and they
21 could pick a locale. It's getting to this agreement to
22 arbitrate where I think there is some disconnect, and perhaps
23 before I even go any further, maybe that's a question for
24 Ms. Clark because I don't need to keep arguing about why the
25 arbitration provision is binding if she agrees that it is.

1 THE COURT: Didn't Express Scripts agree in the
2 2011 amendment that solely with respect to services rendered
3 by any pharmacy location within New York State to any member
4 of any prescription drug program offered by a sponsor that's
5 certified as a managed care organization, the agreement shall
6 be construed and governed in all respects according to the
7 internal laws of the State of New York?

8 MS. HELLMANN: I think that's the introduction
9 paragraph, yes.

10 THE COURT: Don't you agree that with respect to
11 those members that New York law applies?

12 MS. HELLMANN: The New York arbitration provision?

13 THE COURT: That New York law applies to the claims
14 that have been made by the plaintiff in this case?

15 MS. HELLMANN: With respect to those members of a
16 New York MCO -- I just want to make sure I understand your
17 question. Is it that New York governs or that we're going to
18 arbitration in New York?

19 THE COURT: New York law governs.

20 MS. HELLMANN: New York law governs with respect
21 to -- I mean, I agree that that could work. I think in
22 practicality how this could possibly work because it's not
23 these individual claims, again because it was a network-wide
24 termination. It's a breach of contract. So we're not
25 talking about really these provisions when there is a payment

1 dispute relating to these members. So yes, New York law
2 applies to the extent there is members of an MCO -- I'm
3 sorry, service by a New York MCO.

4 THE COURT: And should that arbitration be venued
5 in New York under your agreement with Linden Care?

6 MS. HELLMANN: I don't think that -- the dispute is
7 much broader than New York. So I mean, no, do I think there
8 should be two arbitrations? I don't, I don't. So I think
9 there should be one arbitration proceeding and where that is
10 venued, I mean because, again, if all we're talking about a
11 venue provision, we believe it should be St. Louis County.
12 But really it could be lots of places. What I don't think
13 makes sense is we're going to have two competing arbitrations
14 going on.

15 THE COURT: Because you've asked the Court to
16 transfer this case to Illinois.

17 MS. HELLMANN: To Missouri.

18 THE COURT: I'm sorry, Missouri. So that your
19 position is, as I understand it, arbitration should be in
20 Missouri. That's something the Court has to decide whether
21 to transfer this case to Missouri.

22 MS. HELLMANN: Right. And we do believe, I mean,
23 we believe it should be transferred to Missouri. Your Honor,
24 I guess part of what I'm saying a little bit, if we could cut
25 to the chase a little bit, and I know that if we're agreeing

1 that there is a binding arbitration provision that governs
2 this entire dispute, what law applies, whether we violated
3 New York law, everything, all of these questions that are
4 going to be decided in arbitration, but I don't know that we
5 have that agreement. So yes, we're asking that it be
6 transferred to St. Louis County. It's exactly what I said,
7 if we can get past the is there an agreement to arbitrate,
8 then I think we can get past perhaps a motion to transfer it.
9 But I don't think Ms. Clark agrees with that.

10 And many of the questions that are raised in terms
11 of the conflict of laws, you know, okay, so now we have
12 New York for some of it, Missouri has some of it. Again,
13 it's an issue for the arbitrator.

14 And I think I want to anticipate the arguments
15 against that we have an agreement to arbitrate, the
16 procedural and the subject of unconscionability, New York and
17 Missouri are clear, you do not need mutuality with respect to
18 the arbitration provision. The three cases that Linden Care
19 cited outside of Missouri or New York, so whatever state
20 applies, one's been expressly overruled, that you need
21 consideration for an agreement and that includes the
22 arbitration agreement. And there is no doubt that we have
23 consideration for this agreement. Agree to arbitrate, agree
24 to uphold the terms and conditions, reimbursement for all the
25 claims they submitted, and we have consideration for this

1 agreement.

2 Even with respect to 4406-d and 4803, they're
3 questions for the arbitrator. There is nothing about these
4 laws that somehow trump the binding arbitration provision.
5 It is a very broad provision. It encompasses everything.
6 I'm not going to go through the cases, they're cited in our
7 brief, with respect to why all aspects of this dispute,
8 choice of law, New York public policy, it's issues for the
9 arbitrator.

10 One of the cases that Ms. Clark has referred to
11 repeatedly, the *Foong* case, in that case the Court held that
12 terminating without this notice provision under 4406-d, you
13 know, a provider could do it but it's going to be subject to
14 judicial or in this case review by an arbitrator. There is
15 nothing about those claims that takes this outside of that
16 scope.

17 What we're left with is a binding arbitration
18 provision that encompasses this entire dispute. And, yes,
19 the venue provision of New York, I do not believe for that
20 limited part trumps this, the venue provision of St. Louis
21 County, which is why we asked for it to be transferred. I
22 would be interested if the parties can agree to a binding
23 arbitration provision. Like I said, we can take maybe
24 New York off and St. Louis off and we can agree to someplace.
25 Thank you, Your Honor.

1 THE COURT: Thank you, Ms. Hellmann. Ms. Clark.

2 MS. CLARK: Thank you again.

3 MR. MURPHY: We're having some connectivity issues,
4 for today the connection seems to be different. I don't know
5 if it's possible for us to e-mail a copy to the clerk to put
6 up or else if there is another --

7 MS. CLARK: Is there another way to plug in?

8 MR. MURPHY: Another connection to a laptop.

9 MS. CLARK: You know, Your Honor, we started this
10 litigation with a request for sanctions, and I think that
11 where we are now in looking back on that gives us a telling
12 perspective on how this unfolded. The agreements -- my
13 colleague David Cost is going to address very briefly the
14 arbitration and venue provision. Even from the very
15 beginning the entire case involved a shell game of agreements
16 and addenda and various provisions that Express Scripts
17 claimed applied. It also involved the termination notice
18 that was shown here today is like an ice cube on a summer
19 day.

20 Now we framed that as breach of contract, as a
21 breach of good faith and fair dealing. Your Honor, I think
22 we've shown very clearly, I don't want to spend a lot of time
23 on this, what the other reasons, what the true reasons might
24 have been for the termination. You know we've had testimony
25 about what pharmacists go through to try and connect these

1 patients to these expensive but very valuable and therapeutic
2 drugs they need. You heard that from the patients. You
3 heard it from Mr. Weingarten. It's been uncontradicted on
4 the record of this Court, that's a very important factor
5 here.

6 And that goes to the heart of the 4406-d claim, the
7 4406-c claim. Those are protected activities in New York.
8 These statutes exist to promote and protect professionals
9 from that activity. I'm going to address in a little while
10 via the PowerPoint the agreements and why we think even under
11 the contract it applies. What we have here going back to the
12 termination is a clear pretext.

13 You heard the testimony of the Express Scripts'
14 witness, the person who was given to us as the person
15 knowledgeable for the basis for the termination. She said
16 she did no investigation. She received notification from an
17 individual named Mr. Nevel who was her superior who told her
18 that there was a decision to terminate. She admitted she
19 never investigated any three of the bases that were offered
20 as the bases of terminating Linden Care's contract. That
21 dovetails immediately the problem with a no-notice
22 termination. If there had been any effort under Section 4 of
23 the Provider Agreement, where there is this back and forth
24 provision where there is notice of a problem and an
25 opportunity to cure, if we give any meaning to that

1 provision, then what should have happened and what would have
2 been best for everyone concerned, including the tens of
3 thousands of patients who are impacted here losing their
4 relationship with their trusted prescriber and pharmacy, is
5 that there should have been that give and take of
6 information, notice of a problem, opportunity to cure. And
7 you know what, Mr. Weiner and his team, just like they did
8 this weekend, they would have rolled up their sleeves and
9 said, great, we'll give you an explanation. You have a
10 suspicion. You don't have time apparently to look in your
11 audit files. You're not going to look in our own system for
12 the obvious solution, which was apparent to me as I walked to
13 the podium on Friday. Instead, we're going to terminate
14 first and ask questions later.

15 If they had done that, Linden Care would have had
16 an opportunity to show that each of those three bases was not
17 a legitimate basis for termination. We know, oops, we made a
18 mistake about Maryland. We spread that in the press about
19 Linden Care, it was in the Chicago Tribune, the Wall Street
20 Journal, New York Times, but, oops, we made that mistake.
21 Then we look at California. There was a directed admission
22 in response to the Court's questions that there is no
23 evidence whatsoever that Linden Care ever delivered a
24 prescription to California, to a California resident in
25 violation of law. There has been no presentation to the

1 Court to contradict our witness's testimony that it's
2 important as a matter of patient abandonment to honor those
3 emergency requests. No one has come in here to tell the
4 Court how that would be a violation of law if they had ever
5 bothered to investigate it and provide evidence. So that's
6 item number two.

7 Number three, the violation of the so-called mail
8 order ban. Ms. Roberts' testimony was very telling on that.
9 There is no provision in the agreement that says you can't
10 mail order. Certainly doesn't define mail order. And it
11 certainly doesn't prohibit the practice of home delivery. We
12 heard Ms. Roberts say that there really is no standard, that
13 the criteria that's referred to in 1.14, which is in the
14 Provider Agreement, Your Honor, Exhibit --

15 THE COURT: I have it.

16 MS. CLARK: Okay. You know, even in this provision
17 it says that Express Scripts will develop criteria
18 established from time to time to provide guidance about what
19 they need and what the standards will be. At what point do
20 you become a mail order pharmacy if you're a New York
21 registered retail pharmacy that ships out of state.
22 Ms. Roberts, she didn't even know what the criteria meant.
23 Certainly had never been issued. There is no basis to say
24 that there was a misrepresentation of an identified defined
25 prohibition in the contract that was committed by Linden

1 Care. That was in the termination notice. But looking
2 carefully at this, all we have is a definition. We know that
3 Linden Care is a registered New York retail pharmacy. We
4 know that they -- let's look at the definition, they fill and
5 sell. They dispense out of that New York location. There is
6 just nothing here that makes the percentage of delivery out
7 of state the barometer as a violation of what is really just
8 a definition in the contract.

9 THE COURT: But you would agree that the
10 certification that was made is no longer true as of today?

11 MS. CLARK: Well, Your Honor, the certification was
12 true at the time that it was made. And, Your Honor, the
13 other thing about the certification that I think came out is
14 that there is no indication on the certification whether or
15 not it was by percentage of prescriptions, by percentage of
16 dollars. That certification has very little guidance
17 whatsoever. And all the certification says is that if you
18 get information indicating that your answers are untrue, you
19 need to tell us. There is no evidence that that
20 certification was untrue or needed to be amended because at
21 the time that it was submitted it was untrue. Ms. Roberts
22 admitted that. She admitted there was nothing untrue about
23 that certification, in her testimony which is in the record.
24 So, you know, from Linden Care's perspective, sure,
25 if somehow we figured out that our representation was

1 incorrect and untrue, would there have been an obligation to
2 go back and say, hey, back in 2013 we mentioned 39 percent,
3 but we figured out that our math was wrong and we really
4 should have told you it was 45 percent, that would be one
5 thing. But that's not what they're talking about.

6 Ms. Roberts stated that it's not their practice to have
7 pharmacies routinely update that certification with the
8 percentage of mail order. That's a moving target, it changes
9 every day. And she admitted that there was no standard
10 internally for Express Scripts to expect an update.

11 Besides that, Your Honor, Express Scripts is
12 audited a dozen times a year or more by Express Scripts.
13 They sit down with representatives of Express Scripts who
14 have responsibility for applying, defining, interpreting and
15 enforcing the contract provisions. They disclosed to those
16 individuals everything they were doing, the claims files
17 show, where they're shipping, the audits revealed where they
18 were shipping through the delivery documentation that was
19 required. The idea that there was no information given to
20 Express Scripts that would have given them this eureka
21 realization that we ship a lot of prescriptions out of state
22 via home delivery is just disingenuous. There is just no
23 evidence to support that. And nobody came here and said, oh,
24 we couldn't have known that, and nobody came here and said we
25 didn't actually know that from our data. They actually new

1 all of that at every moment from their own data. And we know
2 that because the infamous spreadsheet shows exactly what they
3 could collect by pressing a button.

4 They're suggesting that some violation of the
5 certification would justify a termination, but also remember
6 a lot of these details on the certification were not in the
7 termination notice. Much of what we heard was post hoc.
8 Well, what we had was an alleged violation of a ban on mail
9 order. And I think that's been shown, none of that evidence
10 came into this courtroom. To the contrary, the Express
11 Scripts' witness really evidenced a complete massive
12 confusion about what that meant, what the standard was, what
13 the percentages might be in a way that would make it
14 ludicrous for a pharmacy to have second-guessed and somehow
15 expected what the standard might be.

16 THE COURT: And Ms. Clark, the agreement allows
17 Express Scripts to terminate on ninety days notice for no
18 reason whatsoever. So how is it irreparable harm to Linden
19 Care at this point?

20 MS. CLARK: Sure. There is a couple different
21 aspects of irreparable harm. I think that's very
22 well-established, Your Honor. I won't spend too much time on
23 that unless you have a question.

24 I talked in my prior comments about the severance
25 of the professional relationship and the cases that I cited

1 to the Court into the record show that that interruption of a
2 professional relationship between a medical provider and a
3 patient, particularly in these circumstances, is a matter of
4 significant and irreparable harm to the pharmacist and the
5 patient. You know, for Linden Care the issue of irreparable
6 harm is very substantial. We're talking about a huge sector
7 of this very concentrated market that Linden Care will no
8 longer be able to access.

9 You heard Mr. Weiner talk about, and I think
10 Mr. Fogel, mentioned that once you lose the large portion of
11 that market, you become a non-option for the prescribers and
12 the manufacturers who manufacture these very specialized
13 drugs.

14 THE COURT: But under the agreement Express Scripts
15 could have terminated Linden Care, so Linden Care would lose
16 that, in any event. So how is it irreparable harm?

17 MS. CLARK: Well, Your Honor, if we -- if we had
18 ninety days notice, if we could go back and handle things
19 that way, we could have gone to Express Scripts and showed
20 them that their three criteria were baseless. And we are
21 very confident that we could have resolved that if they had
22 done it on notice.

23 In addition, we could have gone to court, Your
24 Honor, and we could show that the termination is
25 impermissible under New York law. Under 4406-c, Express

1 Scripts cannot enforce contract terms that inhibit or punish
2 a provider -- I'm paraphrasing, inhibit or punish a provider
3 for advocating for a patient in this utilization review
4 managed care setting.

5 It's our position that would have, should have,
6 could have, if they had given us ninety days notice or if
7 they give us ninety days now, we're prepared to deal with
8 that. Very frankly, we think that by advocating to the
9 plans, the plans need to know that Express Scripts is taking
10 the position that they're now bound by New York law. I'll
11 tell you, the New York State Department of Health is having a
12 meeting as we speak on this issue, and we filed a complaint
13 with the New York State Department of Health because Express
14 Scripts is taking what we think is the outlandish position
15 that they as a contractor for an MCO is not bound by New York
16 law.

17 So the truth is a lot could happen, we expect would
18 happen, in ninety days. The problem here is that Express
19 Scripts gave no consideration for the patients that are
20 involved here. They terminated Linden Care, not because of
21 items one, two and three in the contract. We know now why
22 they terminated us. It came out very clearly during
23 testimony, that Express Scripts is engaged in a massive
24 \$140 million rebate war that is the subject of a lawsuit that
25 they filed, that they served on Horizon the same day that

1 they served us with an instant termination notice. So this
2 is not conspiracy theory. This is a well-documented evidence
3 based explanation, alternative explanation for the true
4 motives of why Express Scripts terminated Linden Care.

5 THE COURT: What's the legal relevance of that?
6 Because if they terminated because of this lawsuit, they do
7 have the right to terminate on ninety days notice.

8 MS. CLARK: Well, they don't have a right to
9 terminate for impermissible reasons under 4406-c, and they
10 don't have the right to terminate for anticompetitive reasons
11 under the antitrust laws. We've identified and we've pled,
12 we're going to be pleading now that we have these other
13 terminations, that there is an actual PBM conspiracy afoot,
14 just as the Court recognized is an appropriately pled
15 allegation in the *Paduano* case.

16 And the Court saw the PowerPoint that Ms. Roberts
17 acknowledged documented the PBM meetings where they talk
18 about what to do with a problem type of pharmacy. And we
19 allege that's exactly what happened here and our pleadings
20 are going to be amended based upon this quickly developing
21 evidence to also plead the *Paduano* conspiracy because now we
22 have those facts. So that's very important here.

23 Lastly, good faith and fair dealing. You know, we
24 think it's very important here that with 4406-d and 4406-c in
25 play, protecting patients' rights, protecting the prescriber

1 from retaliatory conduct when it's an advocate in a
2 utilization review scenario, that that is bad faith and it's
3 not fair dealing. And when you issue a termination without
4 notice that affects tens of thousands of people, and it turns
5 out that the bases for that termination are demonstrably
6 incorrect, then that is a violation of good faith and fair
7 dealing, it's a violation of the contract, and it's an
8 invalid basis for termination.

9 So maybe some day we'll have to deal with the
10 ninety day thing. But this is not a situation where they
11 have an undisputed ironclad ability to terminate with notice
12 within '90s days. And we're willing to deal with it in
13 ninety days, but it's not the type of issue in these
14 circumstances that should be dealt with by the Court at this
15 time.

16 THE COURT: Thank you. Perhaps with the time
17 remaining, I should hear from Mr. Cost.

18 MS. CLARK: I do have the 4406-d issue. How much
19 time do you have left, Your Honor?

20 THE COURT: I can break at 12:30.

21 MS. CLARK: In terms of what your interest is, are
22 you interested hearing the arbitration at this point? It
23 really wasn't in your four points of interest, but it would
24 be a matter for closing. What's your pleasure in terms of
25 what you would like to focus on?

1 THE COURT: It seems to me a tough sell to argue
2 that this arbitration provision was unconscionable because it
3 was a provision that two sophisticated business enterprises
4 entered into. I think it would be of great assistance to the
5 Court if the parties could agree, it appears the case will be
6 headed for arbitration, if the Court could agree on an
7 expedited arbitration and venue, that would be of great
8 assistance to the Court.

9 MS. CLARK: And Your Honor, I think that's
10 something we could consider, but structuring the arbitration
11 so that it honors 4406-d is something that's very important
12 to our pharmacists. This is their professional reputations.
13 These are New York pharmacists, this is a New York pharmacy,
14 it's bound by New York law. That's all things we would be
15 happy to discuss. But what we think should happen here is
16 what just happened in the Southern District of New York.
17 This case should not be referred to arbitration without a
18 resolution, without the protection of a status quo, which at
19 this point is patients getting their drugs. I understand
20 Your Honor's argument that you think it's a mandatory
21 injunction, but the reality is the patients are still in
22 limbo. We've been providing these fills and their interests
23 are at stake here too. So in that sense it's not truly a
24 fait accompli that gives rise to a mandatory injunction. And
25 I believe that the case that Your Honor just cited also

1 recognized that the alternative standard is when there's
2 severe harm. The other half of the quote that I think Your
3 Honor might have been referring to refers to an exception
4 when there's a likelihood of great harm. And if there is one
5 thing that's clear here, is the likelihood of great harm to
6 the patients here.

7 All we have now is letters trickling out with
8 misinformation and what should be done in what an effective
9 way to transfer the prescription. The response of Express
10 Scripts to this entire crisis that they themselves created
11 without any notice is just astounding given the scale of tens
12 of thousands of very sick infirm, many cases very disabled
13 patients that we're serving. That's very shocking here. And
14 we suggest that that alone in light of the merits that I
15 already discussed would certainly justify sending this case
16 off to arbitration with a temporary injunction in place,
17 subject to whatever the arbitrators want to do in that
18 scenario.

19 So, that is the issue here. And looking at
20 *Paduano*, it's an identical set of circumstances in terms of
21 the patient care issues and all of those things. And there
22 is very strong precedent in that case, and a good blueprint,
23 frankly, for what the Court should do, putting aside the
24 venue issue, which Mr. Cost will address. I'm going to
25 mention 4406-d here, because it's something that's critical

1 to the heart of the case. I ask the Court to step back and
2 look at the regulatory structure. We have provided the Court
3 with the agreements between the MCOs and Express Scripts
4 where we clearly show that linkage and the agreement to
5 follow New York law and the way that agency works. We've
6 shown that these are non-delegable duties that are imposed
7 upon everyone in that chain of delivery of managed care
8 services. I walked the Court through earlier through the
9 mandatory clauses, which are specifically referenced in the
10 appendix B, which I referenced today, in the New York
11 addenda, in the Medicaid addenda. They're referenced in the
12 2011 New York agreement. They're actually appended to that
13 agreement.

14 So remembering that the only purpose that Express
15 Scripts functions is as a representative of these MCOs in
16 connection with the administration of benefits. It is really
17 the key here. I have this PowerPoint that can connect the
18 dots. I think what I'm going to do, Your Honor, is just
19 submit it at this point. It has the linkage because these
20 complicated provisions and I'm happy to submit that and yield
21 to my colleague, Mr. Cost.

22 THE COURT: Wouldn't that only apply to members of
23 New York MCOs, in any event?

24 MS. CLARK: No, Your Honor. And I'll tell you why.
25 4406-d does not apply just to New York members. 4406-d

1 protects the pharmacists. Okay, and the pharmacy. It is not
2 dependent upon where the patient that might some day be
3 affected resides. It affects the pharmacist's credentials,
4 their reputation. New York has recognized the very
5 substantial impact that these kinds of terminations can have,
6 and that was one of the reasons that 4406-d was enacted. So
7 if it's a New York pharmacy and New York pharmacist, they're
8 credentialed in New York, they're New York licensed, then
9 they're entitled to a New York hearing. The hearing does not
10 depend on who the patient is or where the patient resides.
11 And we think that should be a very straightforward and simple
12 issue for the Court to resolve. Thank you, Your Honor.

13 THE COURT: Thank you, Ms. Clark.

14 MR. COST: Your Honor, knowing that you're running
15 short on time, again, I will say following up on what
16 Ms. Clark said, this whole arbitration issue is somewhat of a
17 red herring. I don't think the other side disputed that the
18 Court is within its power to grant preliminary injunction
19 TRO, all these issues of arbitrability will be hammered out
20 between the parties. They withdrew their forum selection
21 clause argument. The arbitration provision doesn't have a
22 forum selection clause that compels forum for an action. It
23 just says Missouri.

24 When you look at the language of the contract, the
25 language itself does not compel transfer of forum, it just

1 says binding arbitration in Missouri. I think what's
2 important here is if you look at the language of the clause
3 itself, it specifically references dispute arising to this
4 agreement or any prior agreement. And the word this
5 agreement is repeated within the arbitration clause itself.

6 Well, the 2011 amendment, which then brings in the
7 New York standard clauses, amends that agreement. And then
8 you have the standard clauses which give the guidelines for
9 the termination and, again, not to rehash what Ms. Clark
10 said, we say those apply to the ESI as an IPA under its own
11 contract as well as under the agency. And all those topics
12 have been discussed.

13 With regard to the unconscionability argument,
14 these are one-sided agreements. This is a take it or leave
15 it agreement by ESI. Yes, Linden Care is not two people
16 sitting in a shop doing things, but it's, you know, it is
17 bigger fish, smaller fish, and bigger fish says, you want to
18 be in our pool, you've got to agree to these terms.
19 Completely one sided. And I think what we pointed out in our
20 brief what the Court focused on, ESI provides its right to go
21 into the court and get a TRO and preliminary injunction. It
22 doesn't afford the same remedy. If you look at the later
23 provision in the Provider Manual and other provider mutuals,
24 there is those kind of similarity. Why is that? It goes to
25 the principles of fairness and mutuality.

1 They're saying we're saying the contract itself is
2 wholly unconscionable. No, the arbitration clause is
3 procedurally and substantively unconscionable in itself.
4 Which doesn't compel -- which the Court can look and
5 invalidate that provision and there is always these saving
6 clauses in contracts says one provision, in the Provider
7 Agreement, the rest of the contract remains intact.

8 Again, we've briefed this, Your Honor. You can't
9 get the rights in arbitration that 4406-d provides. Peer
10 review. Again by the plans, the arbitrator, it's a whole
11 different standard where they say this can be raised in
12 arbitration, this can be raised in arbitration. Its
13 different. There is a reason why the 4406-d doesn't say go
14 to arbitration, it says goes to peer review before the panel.

15 THE COURT: Isn't 4406-d essentially incorporated
16 in the provider manual through the addendum.

17 MR. COST: That's what we said, the appendix?

18 THE COURT: Yes.

19 MR. COST: Yes. We talked about that today, so I
20 didn't want to go over old ground. And again, there is the
21 arbitration provision within the Medicaid addendum itself.
22 And again the argument then there is if we are going to have
23 arbitration, it doesn't say, it says breach of the Provider
24 Agreement. Right. Termination of the Provider Agreement,
25 period. It doesn't say termination of the New York portion

1 of the Provider Agreement, just termination, period. So if
2 the Court is going to compel arbitration, it has got to be in
3 New York.

4 Your Honor, those are the points that we raised in
5 our briefs. And we would submit that, number one, we're not
6 disputing the scope of the arbitration here, we're just
7 debating the validity which the Court can rule on, which I
8 think is a threshold issue.

9 THE COURT: Thank you, Mr. Cost. Anything further,
10 Ms. Hellmann? Any wrap-up on that?

11 MS. HELLMANN: If I could just have two minutes.

12 THE COURT: Yes.

13 MS. HELLMANN: There is two points I just want to
14 make. One, 4406-c, which Ms. Clark has referenced a number
15 of times, I have no doubt you would read it, she was
16 paraphrasing it. It was you cannot terminate a provider
17 solely because they're advocating for a patient. It's very
18 different than how it was phrased and I wanted to bring that
19 to your attention.

20 Also I heard the suggestion that the burden to make
21 sure that Linden Care's provider certification is accurate is
22 on Express Scripts. We know about audits, and I hope that
23 it's that clear auditing you're looking at a couple of
24 claims, you're not looking at a book of business. That's not
25 the burden. That's why we don't just ask for accurate

1 certifications, we ask for updated certification. So if
2 39 percent was accurate when they made it and it's not now,
3 that's a breach. That burden cannot be on us to continue to
4 look to see what percentage of business, book of business
5 that this pharmacy is doing. And to somehow claim that while
6 they make the representation it's accurate and they're going
7 to provide any changes and if they don't it can be a breach
8 of the agreement, they now claim that it's our fault that we
9 didn't figure out that they were mailing 70 percent of mail
10 order. That's not our burden. That's exactly why we ask our
11 pharmacies to do it. That's the two points I wanted to
12 raise. Thank you.

13 THE COURT: There are a couple of issues that I've
14 asked counsel for, so I'll give you an opportunity to
15 respond. I know one issue is whether there were, in fact,
16 any shipments of medicines to California. I know Mr. Weiner
17 expected they would know the answer to that by the end of the
18 day. And Ms. Hellmann, if it you have any information on
19 that, the Court is interested in that.

20 The one question, another question the Court had is
21 whether there are emergency exceptions under the law that
22 allow a pharmacy to send drugs into a state in which it's not
23 licensed, specifically California. And I think it would be
24 very helpful if the parties could, in light of the kind of
25 the needs of patients and issues all the issues presented

1 here, if the parties could attempt to work out agreement
2 regarding arbitration, expedited arbitration and location.

3 And I understand the Court has to rule on the
4 motion for a temporary restraining order/preliminary
5 injunction, and I expect to rule shortly on that. How much
6 time does counsel need to provide the Court with the
7 information I just asked for?

8 MS. HELLMANN: Your Honor, could I just get a
9 clarification on the shipments into California? I know that
10 Mr. Weiner said he was going to finish going through that
11 spreadsheet and look, and then there was also some issue that
12 we could ship in there on this emergency basis. I'm assuming
13 that all of that -- I just didn't get the sense that that
14 could all be done by the end of the day today. So I want to
15 make sure that we're clear on what's being looked at. Were
16 there shipments into the State of New York and is there an
17 emergency?

18 THE COURT: Yes, you referred to something in
19 your papers that indicated there was no emergency.

20 MS. HELLMANN: That's correct.

21 THE COURT: I'm not familiar with that.

22 MS. HELLMANN: I think I said there was testimony.
23 But regardless, we'll clear that up. I think it was
24 testimony by Mr. Kersey, but we'll get it in our papers, Your
25 Honor.

1 MS. CLARK: Your Honor, I would just add, I mean,
2 the Express Scripts comes to court and provides to us this
3 information without having provided it before, without
4 explaining it in the termination letter. We've done this
5 huge effort to debunk every single claim except for a handful
6 that are going to be difficult to track down. We're happy to
7 do whatever you want us to do, it would seem that that would
8 not be something that Linden Care would have to do at this
9 point.

10 We've responded effectively and shown that their
11 data was faulty, that it's incomplete. And that really
12 should be something that Express Scripts should come up with
13 at this point rather than asking us to prove our --

14 THE COURT: I understand. And the Court's point is
15 I will consider any information either party has. It is
16 rather curious that Express Scripts would say it's
17 terminating an entity for shipments to California when, in
18 fact, there is no evidence of shipments to California. I
19 understand your position on that. But I will consider any
20 evidence that either party has with respect to whether in
21 fact there were any shipments of medicine to California. And
22 my question is how time do counsel want to provide that, by
23 tomorrow?

24 MS. HELLMANN: Your Honor, just one more. There
25 has been the issue with the mail order. Do you want any

1 backup or information on whether the 39 percent was -- I just
2 want to make sure that I'm clear that I'm addressing each of
3 the three issues that we've addressed in this case and
4 whether there is any backup or information or additional
5 information you want provided about why it went from
6 39 percent to 70 percent.

7 THE COURT: No, I'm not aware of any.

8 MS. CLARK: Your Honor, we can do that by the end
9 of the day in terms of the interaction between New York
10 patient abandonment laws and the issue of nonresident
11 Californians and how that works. I think we can get you
12 something on that by the end of the day. I don't know that
13 it's going to be established by case law or anything, but
14 we'll get you what we can on that issue.

15 But again, Express Scripts has not, never cited to
16 any violation, never proved any violation. And that's what
17 the state of the record is. I don't know that we're going to
18 be able to resolve that issue definitely for Your Honor
19 because it's never really been affirmatively asserted in any
20 way that we can respond to.

21 MS. HELLMANN: Your Honor, we're traveling most of
22 the day today, but the end of the day tomorrow.

23 THE COURT: The Court will accept additional letter
24 response by the end of the tomorrow, by 5 p.m.

25 MS. HELLMANN: I assume you wanted to limit it to

1 these two issues and whether the parties can agree on a
2 venue.

3 THE COURT: Yes, including whether the parties can
4 agree on an expedited administration and the venue for the
5 that. I'm assuming the parties want an expedited
6 arbitration, but at least agree on an arbitration and a
7 venue.

8 MS. HELLMANN: Thank you.

9 THE COURT: I don't expect that I will find that
10 arbitration provision unconscionable, so in the event the
11 Court does not find it unconscionable where the parties will
12 proceed for arbitration, because in any event, I understand
13 that's what has to happen next. I know there needs to be a
14 ruling on the injunction, but the next step would be
15 arbitration.

16 MS. CLARK: Except for the 4406-d hearing, Your
17 Honor.

18 THE COURT: Yes, presumably those could proceed
19 simultaneously.

20 MS. CLARK: That would be possible. I mean, the
21 4406-d hearing is supposed to be a threshold peer review
22 proceeding where other pharmacists look at this and decide if
23 this is appropriate. So we would argue that that absolutely
24 has to happen first.

25 MS. HELLMANN: Your Honor, there needs to be a

1 decision that the 4406-d hearing applies, that Express
2 Scripts is a health care plan. So you're kind of jumping the
3 gun that assuming that 4406-d applies and we violated it. So
4 that is an issue for arbitration. And that it may be we need
5 to go do a 4406-d hearing. But there is an assumption there.
6 I mean, they have a claim, one of their claims for relieve is
7 that it's a breach of 4406-d, so that needs to be decided on
8 the merits before there is this injunction to force a 4406-d
9 hearing, which I don't even think they're seeking in the
10 case. The relief they're seeking is back into the network.

11 THE COURT: I understand. I do believe there needs
12 to be a hearing. And, obviously, that's not an issue, or the
13 Court can't decide that at this point, but it seems to me
14 under the New York Medicaid addendum there needs to be a
15 hearing with respect to the New York Medicaid members.

16 MS. HELLMANN: If there is identified New York
17 Medicaid members, if there are, there are literally thousands
18 of them, then I guess a little bit is they've never raised
19 this New York Medicaid. It's not even a claim in their
20 complaint, Your Honor, is the New York Medicaid addendum.

21 THE COURT: As I understand it, the New York
22 Medicaid addendum essentially incorporates 4406-d, the notice
23 of termination provisions in the citations that plaintiffs
24 counsel has relied on.

25 MS. HELLMANN: Let's back up. If there is --

1 again, I think all of these issues that we're talking about,
2 we're here today on a TRO/PI to order Express Scripts to
3 reinstate with Linden Care. If there is a breach, if there
4 is identified Medicaid members and none of the exceptions
5 apply, again that's an issue that goes to the underlying
6 claim, the merits of their claim. So I'm not saying whether
7 there is or there isn't, but that goes to the merits of the
8 dispute and the substance of the dispute. The relief that
9 they're acting this Court for is a mandatory injunction back
10 into a contract, that's the relief they're seeking.

11 MS. CLARK: I'm not prejudging what the Court is
12 saying. We only point is what we're asking for is an
13 injunction maintaining the patient/pharmacy relationship
14 until such time as the 4406-d hearing is offered and the
15 balance of the issues on the likelihood of the merits on the
16 contract are resolved through you're suggesting arbitration,
17 but that's very clearly what we're looking for here.

18 THE COURT: I understand, Counsel. I understand
19 the parties' positions and I'll look forward to your
20 summations at the end of the day tomorrow.

21 MS. CLARK: One housekeeping issue. I did file the
22 PowerPoint on the 4406-d issue and I'll rest on that because
23 we're out of time.

24 THE COURT: Thank you, counsel.

25 THE CLERK: Court is adjourned.

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
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